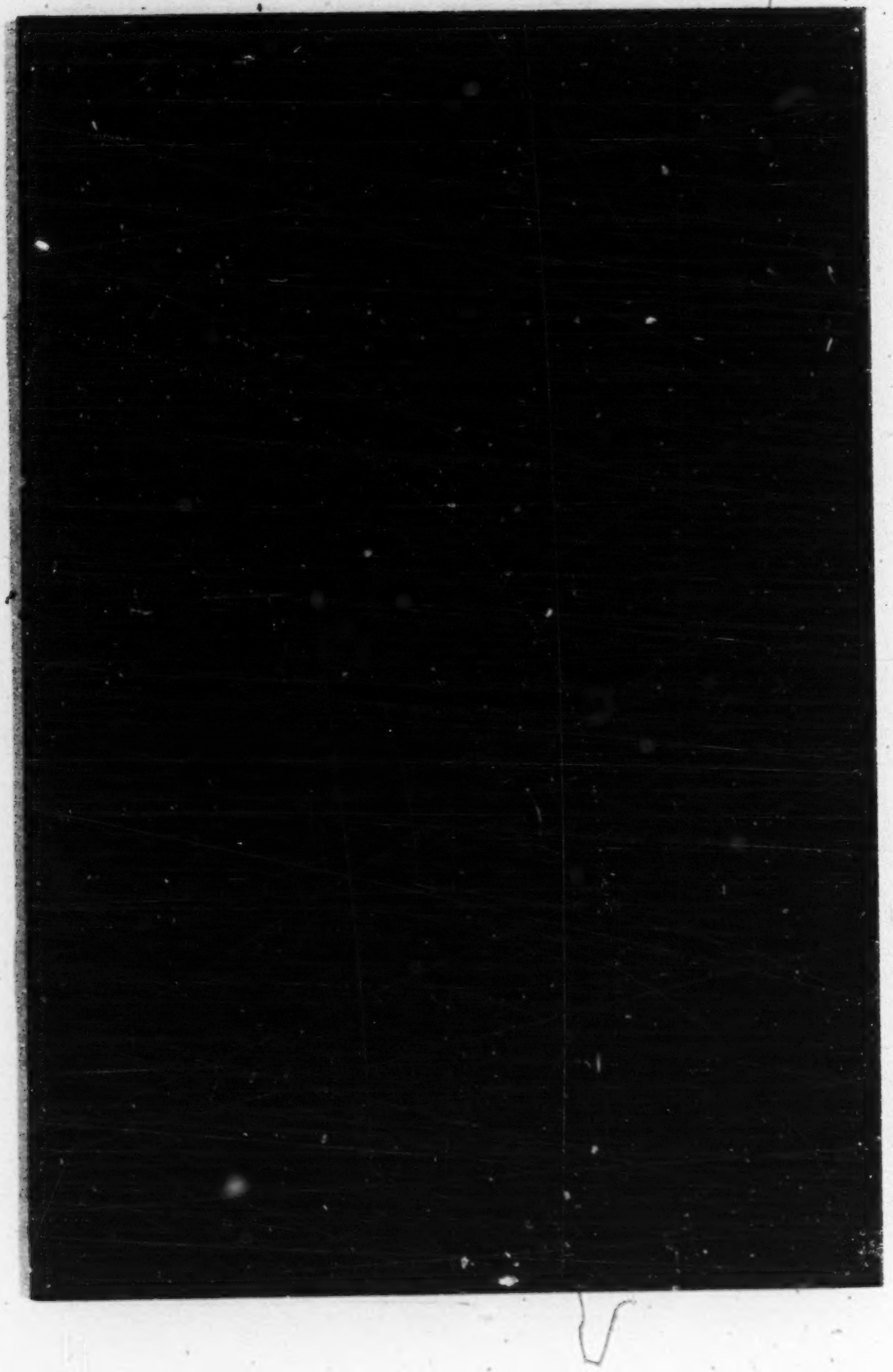

Supreme Court of the United States

OCTOBER TERM, 1961

No. 93

UNITED STATES, PETITIONER

vs.

DANIEL J. KOENIG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

[fol. 1] • • • •

[fol. 2]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, PLAINTIFF

vs.

DANIEL J. KOENIG

MOTION TO SUPPRESS EVIDENCE AND RETURN PROPERTY—
Filed October 12, 1959

COMES Now the Defendant, DANIEL KOENIG, by and through his undersigned attorneys, and respectfully moves this Court to suppress the evidence seized by the Federal Bureau of Investigation, United States Department of Justice, on the night of September 29, 1959 from his, Koenig's, residence located at 1015 N. W. 76th Street, Miami, Dade County, Florida, which said location is within the Miami Division of the Southern District of Florida, and which said location is within the jurisdiction of this Federal District Court, and further moves this Court to return the property seized on the said date from the said address and to suppress and return any other property seized from his, Koenig's, automobile, garage or from any other place or thing belonging to the said Koenig; that in support of this Motion the following is alleged:

I

That the instant Motion is proper and that this Court has jurisdiction to entertain the same under the 4th Amendment of the United States Constitution and Rule 41 of the Federal Rules of Criminal Procedure.

II

That on the night of September 29, 1959, agents of the Federal Bureau of Investigation, United States Depart-
[fol. 3] ment of Justice entered his, Koenig's, residence located at 1015 N.W. 76th Street, Miami, Dade County, Florida without color of a search warrant.

III

That at the time, date and place aforementioned the Defendant, in response to a knock at his front door, answered the same and was "greeted" by a number of United States officials belonging to the Federal Bureau of Investigation, United States Department of Justice and immediately informed that he was under arrest and immediately placed in handcuffs, all this taking place at the Defendant's front door.

IV

That simultaneously, a number of United States officials belonging to the Federal Bureau of Investigation, United States Department of Justice entered his, Koenig's, residence from both the front and rear doors and proceeded to search the entire seven room house, the entire curtilage and that pursuant thereto certain personal properties including currency of the United States, papers and clothing was seized illegally.

V

That the said Defendant was arrested as above described without color of an arrest warrant but apparently arrested on information that a Complaint was being filed or had been filed earlier that date in Steubenville, Ohio.

[fol. 4]

VI

That in furtherance of this unreasonable search and seizure the said agents proceeded to search the automobile of the Defendant which said automobile was located several city blocks away from the residence of the Defendant.

VII

That the Defendant is without actual knowledge as to what personal property was seized throughout all of these unreasonable searches as no inventory was ever made to him but does know from statements made by various of the said agents to him and allegedly made by the said agents to the newspapers that monies, papers, weapons and clothing were seized, all of the same not being found on his person or within his immediate possession at the time of his unlawful arrest.

VIII

That the said arrest was unlawful because it was without an arrest warrant; the said arrest was not based on facts known to the said agents perfecting the arrest which gave them grounds to reasonably believe that the said Defendant had committed a felony or was committing a felony; that the said arrest, if perfected upon information that a Complaint had been filed out of the District, was still unlawful as the said Complaint failed to allege sufficient facts upon which a lawful arrest warrant could issue.

[fol. 5]

IX

That no night time (or day) search warrant was ever obtained for the Defendant's person, house, garage or automobile by the said agents.

X

That at no time was consent ever given by the Defendant to the said agents to search his person, house, garage or automobile.

Because of the aforesaid, the Defendant respectfully moves this Court to suppress all the evidence seized by these said agents and return of the said property seized from his person, house, garage and/or automobile.

Respectfully submitted,

/s/ Jos. P. Manners
Jos. P. Manners
311 Industrial National Bank Building
Miami 32, Florida

and

/s/ Harold P. Barkas
Harold P. Barkas
DuPont Building, Suite 1425
Miami, Florida

[fol. 6] Certification of Service Omitted in Printing

[fol. 9]

IN UNITED STATES DISTRICT COURT

REMOVAL PROCEEDINGS:

REPORT AND RECOMMENDATIONS—Filed October 14, 1959

To the Judges of the District Court of the United States for the Southern District of Florida:

The defendant, DANIEL J. KOENIG, was arrested on September 29, 1959, by Special Agent, Charles A. Hardison, of the Federal Bureau of Investigation on the basis of an outstanding Warrant of Arrest issued by a United States Commissioner for the Southern District of Ohio, Eastern Division, following a complaint charging DANIEL J. KOENIG with taking approximately $38,000.00 from John Olszowy, Cashier of The Community Savings Bank Company of Yorkville, Ohio, by force, violence and intimidation, as will appear from the copy of the Complaint and Warrant filed herewith in violation of Title 18, Section 2113 (a) and (d) U. S. Code. Final hearing was held on October 9, 1959.

EVIDENCE:

In support of the application for removal the Government produced the following witnesses:

Special Agent Charles A. Hardison, Federal Bureau of Investigation, who testified that he arrested the defendant, DANIEL J. KOENIG, at Miami, Florida, and found in [fol. 10] his possession approximately $14,000.00 in currency and a .45 Caliber Colt Automatic.

Cally Bragalone, an employee of the Bank who witnessed the robbery and the taking of approximately $38,000.00, and identified the accused as participating therein and the possession by the robber of a gun similar in appearance to the gun found in the possession of the accused.

Charles D. Eisenhower, a customer of the Bank who witnessed the robbery, had a gun placed in his side by one of the robbers and was made to walk to a vault, who

identified the accused as participating in the robbery and the gun used as similar to the gun found in the possession of the accused.

FINDINGS:

I, therefore, find that probable cause exist to believe the accused to be the person named in the Complaint and Warrant, and that the robbery by force, violence and intimidation took place as alleged in the Complaint and that the accused participated therein.

RECOMMENDATION:

IT IS THEREFORE, recommended that:

(a) A Warrant of Removal of the accused, DANIEL J. KOENIG, to the Southern District of Ohio, be entered herein.

[fol. 11] Respectfully submitted,

ROGER EDWARD DAVIS
U. S. Commissioner
Southern District of Florida
Miami Division

Complaint and Warrant is filed herewith.

CERTIFICATE OF SERVICE OMITTED IN PRINTING

[fol. 13]

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Commissioner's Docket No. 2
Case No. 57

UNITED STATES OF AMERICA

v.

DANIEL J. KOENIG

COMMISSIONER'S WARRANT OF ARREST

To Any Authorized United States Officer:

You are hereby commanded to arrest (here insert name of defendant or description) Daniel J. Koenig, and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with (here describe offense charged in complaint) taking from John Olszowy, Cashier of The Community Savings Bank Company of Yorkville, Jefferson County, Ohio, by force, violence and intimidation money in the amount of about $38,000.00 which money was at that time in the custody, control and possession of said Bank; and, in so doing placed the life of said Cashier in jeopardy by use of a gun in violation of U.S.C. Title, 18, Section 2113 (a) and (d).

Date September 29, 1959.

/s/ Joseph Freedman
United States Commissioner

1. Here insert designation of officer to whom warrant is issued.

RETURN

Received 10-2-59, 1959 at Miami, Fla. and executed by arrest of Daniel J. Koenig at Miami, Fla. on Sept. 29, 1959.

/s/ Charles A. Hardison Name
Special Agent, F.B.I. Title
Southern District of Florida

Date Oct. 2, 1959

By Deputy

[fol. 15]

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Commissioner's Docket No. 2
Case No. 57

UNITED STATES OF AMERICA

v.

DANIEL J. KOENIG

COMPLAINT FOR VIOLATION OF U.S.C. TITLE 18 SECTION 2113 (a), (d)

BEFORE (Name of Commissioner) Joseph Freedman.
(Address of Commissioner) Steubenville, Ohio

The undersigned complainant being duly sworn states:

That on or about August 22, 1959, at Yorkville, Belmont County in the Southern District of Ohio, (name of accused) Daniel J. Koenig did (here insert statement of the essential facts constituting the offense charged) with accomplice by force and violence and intimidation take from the person and presence of another approximately

$38,000.00 belonging to and in the care, custody, control, management and possession of a bank, to wit, the Community Savings Bank, at Yorkville, Ohio; the deposits of which are insured by the Federal Deposit Insurance Corporation; further, Daniel J. Koenig entered said Bank armed with a pistol and ordered Thomas C. Icenhower, Mrs. Cally Bragalone and other customers and employees of said Bank to enter the vault while his accomplice took from the bank cashier of said bank the aforementioned sum of money;

And the complainant further states that that Thomas C. Icenhower and Mrs. Cally Bragalone who were present at the above described bank robbery have identified photographs of Daniel J. Koenig, defendant herein, as being one of the bank robbers and on October 9, 1959 personally identified him as such robber, and are material witnesses in relation to this charge.

/s/ Robert R. Rockwell
Signature of Complainant
Special Agent, F.B.I.
Official Title, "if any"

Sworn to before me, and subscribed in my presence, October 13, 1959.

/s/ Joseph Freedman
United States Commissioner

[fol. 17]

IN UNITED STATES DISTRICT COURT

REMOVAL PROCEEDINGS:

REPORT AND RECOMMENDATIONS—Filed November 4, 1959

To the Judges of the District Court of the United States for the Southern District of Florida:

The defendant, DANIEL J. KOENIG, was arrested on October 19, 1959, upon a warrant based upon an indictment returned in the District Court of the United States for the Southern District of Ohio, Eastern Division.

Removal hearing was held before the undersigned United States Commissioner on November 2, 1959.

EVIDENCE:

The Government introduced a certified copy of indictment Criminal No. 7558 returned on October 16, 1959, which alleged an offense against the laws of the United States of America within the jurisdiction of the District Court of the United States for the Southern District of Ohio.

Special Agent Robert R. Rockwell of the Federal Bureau of Investigation, testified that he appeared before the Grand Jury returning the aforesaid indictment on October 16, 1959, and testified concerning his investigation of the offense alleged and exhibited to the Grand Jurors [fol. 18] a picture bearing a likeness to the accused, which is attached to this report marked Government's Exhibit "A". This picture he had shown to Bank employees who testified it has the likeness of one of the persons who held up the Community Savings Bank Company of Yorkville, Ohio.

Cally Bragalone, an employee of the Bank identified the accused as one of the persons who held up the Bank. She did not appear before the Grand Jury.

FINDINGS:

I find that the evidence introduced by the Government is sufficient to establish probable cause for the removal of the defendant.

RECOMMENDATION:

IT IS, THEREFORE, recommended that:

(a) An Order be entered herein removing the defendant, DANIEL J. KOENIG, to the Southern District of Ohio, Eastern Division.

Respectfully submitted,

ROGER EDWARD DAVIS
U. S. Commissioner
Southern District of Florida
Miami Division

[fol. 19] Warrant for Arrest of Defendant, Government's Exhibit "A", and Certified copy of Indictment are filed herewith.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing REPORT AND RECOMMENDATIONS was delivered to LLOYD G. BATES, JR., Assistant United States Attorney, Attorney for Plaintiff, and JOSEPH P. MANNERS, Attorney for Defendant, 311 Industrial National Bank Building, Miami, Florida, on November 4, 1959.

ROGER EDWARD DAVIS

[fol. 27]

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Commissioner's Docket No. 2
Case No. 57

UNITED STATES OF AMERICA
v.
DANIEL J. KOENIG

WARRANT OF ARREST

To Any Authorized United States Officer:

You are hereby commanded to arrest (here insert name of defendant or description) Daniel J. Koenig, and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with (here describe offense charged in complaint) accomplice by force and violence and intimidation take from the person and presence of another about $38,000 belonging to and in the care, custody, control and management of a bank, to wit, the Community Savings Bank, at Yorkville, Ohio; the deposits of which are insured by the Federal Deposit Insurance Corporation; and that said robbery occurred on or about the 22nd day of August, 1959 in violation of U.S.C. Title, 18, Section 2113 (a) and (d).

Date October 13, 1959.

/s/ Joseph Freedman
United States Commissioner

1. Here insert designation of officer to whom warrant is issued.

RETURN

Received October 16, 1959 at Miami, Fla., and executed by arrest of Daniel J. Koenig at Miami, Fla. on October 16, 1959.

THOS. H. TRENT — Name
U.S. Marshal — Title
Southern District of Florida

Date October 16, 1959.

By /s/ Charles G. Traband, Deputy
CHAS. G. TRABAND

[fol. 29]

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Commissioner's Docket No. 2
Case No. 57

UNITED STATES OF AMERICA

v.

DANIEL J. KOENIG

COMPLAINT FOR VIOLATION OF U.S.C. TITLE 18 SECTION 2113 (a) and (d)

BEFORE (Name of Commissioner) Joseph Freedman.
(Address of Commissioner) Steubenville, Ohio

The undersigned complainant being duly sworn states:

That on or about August 22, 1959, at Yorkville, Jefferson County in the Southern District of Ohio, (name of accused) Daniel J. Koenig did (here insert statement of the essential facts constituting the offense charged) take from John Olszowy, Cashier of The Community Savings Bank Company of Yorkville, Jefferson County, Ohio, by force, violence and intimation money in the amount of about $38,000.00 which money was at that time in the custody, control and possession of said bank; and, in committing this offense, placed in jeopardy the life of said John Olszowy, Cashier, by the use of a dangerous weapon, to wit, a gun;

And the complainant further states that he believes that
are material witnesses in relation to this charge.

/s/ Glenn L. McAvoy
Signature of Complainant
Special Agent, F.B.I.
Official Title, "if any"

Sworn to before me, and subscribed in my presence, September 29, 1959.

/s/ Joseph Freedman
United States Commissioner

[fol. 33]

IN UNITED STATES DISTRICT COURT

Motion to Stay Return of Property—
Filed November 25, 1959

The Aetna Casualty & Surety Company moves the Court to stay the return of property, to wit: money described in the motion to suppress evidence and return property filed herein by Daniel J. Koenig. And for grounds thereof says as follows:

1. Aetna Casualty & Surety Company is a Connecticut corporation, with its principal place of business in Hartford, Connecticut, and is licensed to do business in the State of Florida.

2. On August 22, 1959, and at all times material hereto, the Community Savings Bank of Yorkville, Ohio, was insured by Aetna Casualty & Surety Company under provisions of an insurance bond issued in favor of the Community Savings Bank of Yorkville, Ohio, by Aetna Casualty & Surety Company.

3. Under the provisions of this insurance bond the Aetna Casualty & Surety Company agreed to indemnify and hold harmless the Community Savings Bank of Yorkville, Ohio, which includes, but is not limited to, loss through robbery, theft, or hold-up.

4. On August 22, 1959, by force of arms and threats of violence Daniel J. Koenig unlawfully took from the Community Savings Bank of Yorkville, Ohio, United [fol. 34] States currency belonging to the said Bank in the amount of $38,846.00.

5. By virtue of the loss sustained by the Community Savings Bank of Yorkville, Ohio, through the robbery, theft, or hold-up of the Community Savings Bank of Yorkville, Ohio, by Daniel J. Koenig on August 22, 1959, as set forth above, the Aetna Casualty & Surety Company, under the terms of the said insurance bond, paid to the Community Savings Bank of Yorkville, Ohio, the sum of $38,846.00, and therefore the Aetna Casualty & Surety Company became subrogated to the rights of the

Community Savings Bank of Yorkville, Ohio, to the said $38,846.00, or any part thereof.

6. On September 29, 1959, agents of the Federal Bureau of Investigation seized from the premises leased to Daniel J. Koenig at 1015 N.W. 76th Street, Miami, Florida, approximately $14,000.00 in United States currency.

7. The aforesaid money is part of the $38,846.00 which was unlawfully taken from the Community Savings Bank of Yorkville, Ohio, by Daniel J. Koenig and is the lawful property of the Community Savings Bank of Yorkville, Ohio, to whose rights in this money the Aetna Casualty & Surety Company is subrogated.

8. Daniel J. Koenig, by motion filed herein on October 12, 1959, seeks the return of the money seized on September 29, 1959.

9. The retention of the said money by the Court, or its duly appointed custodian, pending an adjudication of the rights thereto as between Aetna Casualty & Surety [fol. 35] Company and Daniel J. Koenig, is necessary to preserve the said money for delivery to its true owner.

WHEREFORE, the Aetna Casualty & Surety Company moves the Court to enter an order staying the return of the aforesaid money to Daniel J. Koenig, and directing the Court, or its duly appointed custodian, to retain possession thereof pending an adjudication, by a plenary proceeding, of the rights thereto as between Aetna Casualty & Surety Company and Daniel J. Koenig.

BLACKWELL, WALKER & GRAY,
Attorneys for Aetna Casualty & Surety Company,

By LOUIS L. LAFONTISEE, JR.
First Federal Building.
Miami 32, Florida

CERTIFICATE OF SERVICE OMITTED IN PRINTING

[fol. 36] • • • •

[fol. 37]

IN UNITED STATES DISTRICT COURT

ORDER ON MOTION TO SUPPRESS EVIDENCE—Dec. 18, 1959

THIS CAUSE came on to be heard upon the motions filed on behalf of the Defendant, DANIEL J. KOENIG, to suppress evidence and return to the Defendant certain property seized by the Federal Bureau of Investigation, an agency of the United States Government, in connection with the arrest of the Defendant and the search conducted in and about the premises of the Defendant's residence located at 1015 N.W. 76th Street, Miami, Dade County, Florida, on September 29, 1959.

Testimony was taken pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure and the Court heard argument of counsel for the respective parties. The Court, having considered the record, together with the exhibits, and the briefs submitted herein, is of the opinion that the agents making the arrest without warrant had probable cause therefor but that the said search was unreasonable and in violation of the Fourth Amendment to the Constitution of the United States. It is, therefore, upon consideration

ORDERED, ADJUDGED and DECREED that the Defendant's Motion to Suppress Evidence be, and the same is hereby, granted and all evidence seized by the Federal Bureau of Investigation at 1015 N.W. 76th Street, Miami, Dade County, Florida, and from the automobile nearby on September 29, 1959, be, and the same is hereby, suppressed. It is further

ORDERED, ADJUDGED and DECREED that the Defendant's [fol. 38] Motion for Return of Property seized during the said search be, and the same is hereby, denied without prejudice to the Defendant's right to renew said motion in the trial court. It is further

ORDERED, ADJUDGED and DECREED that all property seized from the residence of the Defendant, at 1015 N.W. 76th Street, Miami, Florida, and from his automobile located nearby on September 29, 1959, shall remain in

the custody of the United States government officials and in due course be transmitted to the jurisdiction and authority of the District Court for the Southern District of Ohio for a final determination of the ownership or right of possession of the said property.

DONE and ORDERED in Chambers at Miami, Florida, this 18th day of December, A.D. 1959.

JOSEPH P. LIEB
United States District Judge

• • • •

[fol. 39] • • • •

[fol. 40]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed Jan. 18, 1960

Comes now plaintiff, United States of America, and appeals to the Fifth Circuit from order entered herein on December 18, 1959.

E. COLEMAN MADSEN,
United States Attorney

by: /s/ Lloyd G. Bates, Jr.
LLOYD G. BATES, JR.,
Assistant U. S. Attorney
Attorneys for plaintiff
UNITED STATES OF AMERICA

THIS IS TO CERTIFY that true and correct copies of the foregoing were this 18th day of January, 1960, mailed to Joseph P. Manners and Harold P. Barkas, Esqs., Industrial National Bank Bldg., Miami, Florida, and Blackwell, Walker & Gray, Esqs., First Federal Building, Miami, Florida, attorneys for defendant.

/s/ Lloyd G. Bates, Jr.

[fols. 41-310] • • • •

[fol. 311] IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18355

UNITED STATES OF AMERICA, APPELLANT

versus

DANIEL J. KOENIG, APPELLEE

Appeal from the United States District Court for the Southern District of Florida

OPINION—April 12, 1961

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The scales of justice are not always evenly balanced; one of the scales holds a few extra weights in favor of a person accused of crime. This appeal deals with one of those weights: the limited jurisdiction of this Court to hear a government appeal [fol. 312] from an order of a district court suppressing evidence.[1] For purposes of the appeal, two elements in

[1] September 10, 1959, F.B.I. agents arrested Daniel J. Koenig in Miami, Florida, on a faulty arrest warrant and on probable cause based on a teletype communication from Ohio that a complaint had been filed against Koenig charging him with a bank robbery. After Koenig's arrest, agents searched the house he rented, his garage, and his automobile. They seized, among other things, an attache case containing $13,190, a 45 calibre blue steel Colt automatic, a masquerade make-up kit, a box containing forty coin-wrappers, two rolls of pennies with fifty pennies in each roll, and other articles including a black ceramic cat containing $340. Octcober 9, 1959, the United States Commissioner at Miami held a final hearing on the Ohio complaint. October 12 Koenig filed a motion in the District Court for the Southern District of Florida, under Rule 41(e), Fed. R. Crim. P., for the suppression of the seized property and for the return of the property. Two days later, the Commissioner filed his written findings and recommendation that a warrant of removal of Koenig be entered. October 16, four days after the motion to suppress was filed, an indictment was returned against Koenig in the Southern District of Ohio. December 18, 1959, after three hear-

the case are important. (1) The defendant filed his motion to suppress before he was indicted, but after a complaint was issued against him and after a commitment hearing before the United States Commissioner. (2) The suppression order was issued in a district different from the district in which the defendant was indicted and will be tried. We hold that the order is not appealable. *Zacarias* v. *United States*, 5 Cir., 1958, 261 F.2d 416, cert. den. 359 U.S. 935, 79 S.Ct. 650, 3 L.Ed. 2d 637, controls our decision.

Government appeals in criminal cases are exceptional and are not favored by the courts. *Carroll* v. *United* [fol. 313] *States*, 1957, 354 U.S. 394, 400, 77 S.Ct. 1332, 1 L.Ed. 2d 1442. Such appeals must be based on express statutory authority; the government had no right of appeal at common law. *United States* v. *Sanges*, 1892, 144 U.S. 310, 12 S.Ct. 609, 36 L.Ed. 445; *United States* v. *Janitz*, 3 Cir., 1947, 161 F.2d 19; *United States* v. *Rosenwasser*, 9 Cir., 1944, 145 F.2d 1015. See Orfield, Criminal Appeals in America, p. 58 (1939).

The primary statutory authority for government appeals in criminal cases, 18 U.S.C.A. 3731, does not specifically include appeals from orders suppressing evidence.[2]

---

ings on earlier dates, the district court in Florida granted Koenig's motion to suppress the evidence and denied the motion for return of the property. The court held that the F.B.I. agents had probable cause to make the arrest without a warrant, but that the search was unreasonable and violative of the Fourteenth Amendment. The Government appeals from that order denying the motion to suppress; the defendant has not appealed from denial of the motion for return of the property. We do not discuss the reasonableness of the search and seizure, because of our holding that the order is not appealable.

[2] "An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances: From a decision of judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section. From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section. The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted." 18 U.S.C.A. § 3731.

The Judicial Code, however, does authorize appeals from "all *final* decisions of the district courts . . . except where a direct review may be had in the Supreme Court." 28 U.S.C.A. § 1291. The appealability of an order suppressing evidence depends, therefore, upon whether it is "final".[3] [fol. 314] Orders in an incidental ancillary proceeding to a criminal action are interlocutory and non-appealable; orders in independent plenary proceedings are final and appealable. *United States* v. *Wallace & Tiernan Co.*, 1949, 336 U.S. 793, 69 S.Ct. 824, 93 L.Ed. 1042; *Cogen* v. *United States*, 1929, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275; *United States* v. *Ponder*, 4 Cir., 1956, 238 F.2d 825. See 6 Moore, Federal Practice, ¶ 54.14.

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[3] In criminal cases a final judgment or order may be reviewed by way of immediate appeal or writ or error, but absent special statutory authorization an interlocutory order cannot be so reviewed. See 6 Moore, Federal Practice, ¶ 54.11, 54.12, 54.14, 54.16; 2 Am.Jur., Appeal & Error, § 21. The final judgment as a basis for appeal is an historic concept, the modern rationale of which is to prevent congestion in the appellate courts. See Crick, The Final Judgment as a Basis for Appeal, 41 Yale L.J. 539 (1932). Crick suggests that upon analysis the "final judgment" rule causes as much labor as it saves, however, since it requires repeated litigation to determine what is and what is not a final judgment. Id. at 557-63. This case offers additional evidence to substantiate his thesis. Nevertheless the function of the rule is to avoid piecemeal litigation and the delays, caused by interlocutory appeals. See 6 Moore, Federal Practice, ¶ 54.11; Lewis v. E. I. DuPont de Nemours & Co., 5 Cir., 1950, 183 F.2d 29. "Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice." Mr. Justice Frankfurter in Cobbledick v. United States, 1940, 309 U.S. 323, 325, 60 S.Ct. 540, 84 L.Ed. 783.

The crucial factor in deciding whether a suppression order is issued in an independent proceeding or is merely a step in the trial of a case, is the pendency of a criminal action in which the evidence sought to be suppressed may be used.[4] If there is no criminal proceeding pending, a motion for suppression of evidence and the return of [fol. 315] such (evidential) property is an independent civil suit. But at what stage does a criminal proceeding begin? The courts of appeal have reached various answers.[5]

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[4] As Judge Tuttle states the test in Zacarias v. United States, 5 Cir., 1958, 261 F.2d 416, 417, cert. den. 359 U.S. 935, the answer to the question whether an order to suppress evidence is final or interlocutory is found by determining whether the motion was made in "an independent civil proceeding, finally terminated with the order denying [or granting] the relief or is ancillary to a pending criminal proceeding." The time at which the motion was made, rather than the time at which it is passed upon by the court, controls in determining the character of the proceeding. Cogen v. United States, 278 U.S. 221, 49 St. Ct. 118, 73 L.Ed. 275; United States v. Poller, 2 Cir., 1930, 43 F.2d 911.

[5] *Second Circuit:* Cheng Wai v. United States, 2 Cir., 1942, 125 F. 2d 915 (before indictment, order appealable); United States v. Poller, 2 Cir., 1930, 43 F.2d 911 (after proceedings before commissioner, but before indictment; order appealable).

Third Circuit: United States v. Wheeler, 3 Cir., 1958, 256 F.2d 745, cert. den. 358 U.S. 873 (after indictment, order appealable; United States v. Pack, 3 Cir., 1957, 247 F.2d 168 (after indictment and dismissal, order not appealable); United States v. Bianco, 3 Cir., 1951, 189 F.2d 716 (before indictment, order appealable); United States v. Janitz, 3 Cir., 1947, 161 F.2d 19 (after indictment, order not appealable); Re Sana Laboratories, Inc., 3 Cir., 1940, 115 F.2d 717, cert. den. sub. nom. Sana Laboratories, Inc. v. United States, 1941, 312 U. S. 688 (after indictment, order appealable).

Fourth Circuit: United States v. Ponder, 4 Cir., 1956, 238 F.2d 825, noted in 35 No. Car. L. Rev. 501 (1957) (after indictment, order appealable); United States v. Williams, 4 Cir., 1955, 227 F.2d 149 (before indictment, order not appealable).

Fifth Circuit: Zacarias v. United States, 5 Cir., 1958, 261 F.2d 416, cert. den. 359 U.S. 935 (before indictment, order not appealable); United States v. Ashby, 5 Cir., 1957, 245 F.2d 684 (after indictment and dismissal, order appealable); Davis v. United States, 5 Cir., 1943, 138 F.2d 406 (hearing before Grand Jury, order appealable); Turner v. Camp, 5 Cir., 1941, 123 F.2d

[fol. 316] The filing of an information or an indictment is frequently accepted as the dividing-line to mark the beginning of criminal proceedings. See Orfield, Criminal Procedure from Arrest to Appeal, pp. 204-208 (1947). The difficulty here is that at the time Koenig filed his motion, there was no way of knowing positively that he would be indicted. In *Post* v. *United States*, 1894, 161 U.S. 583, 587, 16 S.Ct. 611, 40 L.Ed. 816, (not, however, involving a motion to suppress) the Supreme Court said:

> "Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate. [citations omitted]. The submission of a bill of indictment by the attorney for the government to the grand jury, and the examination of witnesses before them, are both in secret, and are no part of the criminal proceedings against the

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840 (summary proceeding against prosecuting officer, order appealable).

Sixth Circuit: Dowling v. Collins, 6 Cir., 1926, 10 F. 2d 62 (criminal case pending, order nevertheless appealable).

Seventh Circuit: United States v. One Plymouth Sedan Automobile, 7 Cir., 1948, 169 F.2d 3 (after indictment, order not appealable).

Ninth Circuit: United States v. Sugden, 9 Cir., 1955, 226 F.2d 281, aff'd mem., 1956, 351 U.S. 916 (after indictment and dismissal, order appealable); Weldon v. United States, 9 Cir., 1952, 196 F.2d 874 (before indictment or information, after complaint, arrest, and arraignment; if order effective, appealable); Freeman v. United States, 9 Cir., 1946, 160 F.2d 69 (after complaint and hearing before Commissioner, but before indictment, order appealable); United States v. Rosenwasser, 9 Cir., 1944, 145 F.2d 1015 (after first trial, before new trial, order not appealable).

District of Columbia Circuit: United States v. Stephenson, D.C. Cir., 1955, 223 F.2d 336 (after indictment, order not appealable); Nelson v. United States, D.C. Cir., 1953, 208 F.2d 505, cert. den. 346 U.S. 827 (before indictment, order not appealable); United States v. Cefarvatti, D.C. Cir., 1952, 202 F.2d 13, noted in 21 Geo. Wash. L. Rev. 631, 39 Va. L. Rev. 103, 41 Geo. L. J. 259 (after indictment, order appealable). See Friedenthal, Government Appeals in Federal Criminal Cases, 12 Stan. L. Rev. 71, 83-102 (1959); Note, 106 U. Pa. L. Rev. 612 (1958).

accused, but are merely to assist the grand jury in determining whether such proceedings shall be commended; the grand jury may ignore the bill, and decline to find any indictment; and it cannot be known whether any proceedings will be instituted against the accused until an indictment against him is presented in open court."

When the motion to suppress is made *after* indictment the order is considered interlocutory and neither the defendant nor the government may appeal from it, be-[fol. 317] cause the question whether the accused would be indicted has been resolved and motions related to the suppression of evidence are integrally related to the criminal proceeding. *Carroll* v. *United States*, 1957, 354 U.S. 394, 77 S.Ct. 1332, 1 L.Ed. 2d 1442 (government's right to appeal); *Cogen* v. *United States*, 1929, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275 (defendant's right to appeal). Orders suppressing evidence are then in the nature of a trial judge's rulings on admissibility of evidence. Even when the motion results in dismissal of the indictment for lack of evidence, the order is not final and hence not appealable. *Carroll* v. *United States*, 1957, 354 U.S. 394, 77 S.Ct. 1332, 1 L.Ed. 2d 1442. But where the motion is made by the applicant *before* an information or indictment is found or returned against him, some courts —and we recognize the force of their arguments—treat the proceeding as independent and the resulting order final and appealable. *Go-Bart Importing Co.* v. *United States*, 1931, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 344; *Burdeau* v. *McDowell*, 1920, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048; *Perlman* v. *United States*, 1918, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950; *Davis* v. *United States*, 5 Cir., 1943, 138 F.2d 406; *Cheng Wai* v. *United States*, 2 Cir., 1942, 125 F.2d 915.

This Court has drawn the line at a stage earlier than indictment. *Zacarias* v. *United States*, 5 Cir., 1958, 261 F.2d 416, cert. den. 359 U.S. 935, 79 S.Ct. 650, 3 L.Ed. 2d 637. This Court treats an indictment, once made, as relating back, at least to the extent that when an indictment has been returned, an order to suppress, following on the heels of a complaint and a commitment hearing,

is treated as one step in a series of steps constituting [fol. 318] the criminal proceeding. In Zacarias the defendant's motion to suppress was filed and denied before indictment.[6] A complaint had been issued by a United States Commissioner, a commitment hearing had been held, and Zacarias was already bound over to the district court. This Court refused to allow an appeal by the defendant, on the ground that the order denying his motion was interlocutory. Koenig is in no different situation from Zacarias. Here, a complaint and a warrant had been issued, the Commissioner had held a full preliminary hearing, the Commissioner had announced oral findings recommending that Koenig be removed to the district court in the Southern District of Ohio, and the district court reached its decision on suppressing the evidence four months after Koenig had been under indictment. In the light of Zacarias, Koenig's motion to suppress was not an independent action but simply an early step in the criminal case against him.[7]

The fact that the motion for the return of property was denied, while the motion to suppress was granted, so that the property remains in the possession of the court, [fol. 319] adds some weight to the view that the order appealed from is interlocutory. Cf. *United States* v. *Rosenwasser*, 9 Cir., 1944, 145 F.2d 1015, 1017; *Carroll* v. *United States*, *supra* at p. 404, n. 17.

The Government seeks to distinguish Zacarias on the ground that the Zacarias appeal was from an order *deny-*

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[6] See also Saba v. United States, 5 Cir., 1960, 282 F.2d 255 and Peterson v. United States, 5 Cir., 1958, 260 F.2d 265, in which cases, however, the motion to suppress was filed after indictment. See United States v. Williams, 4 Cir., 1955, 227 F.2d 149, cited with approval in Zacarias.

[7] "However, we think it quite plain that after a complaint has been issued by a United States Commissioner, the accused has been afforded a commitment hearing at which he is permitted to cross examine the prosecuting witnesses and to testify, if he so desires, in his own behalf, and is then, in the language of the statute '[held] to answer in the district court,' a motion thereafter made under Rule 41(e) is incidental to the criminal proceeding already commenced and pending. An order on such motion is not final; it is interlocutory and is not appealable." Zacarias v. United States, 5 Cir., 1958, 261 F.2d 416, 418.

ing a defendant's motion to suppress evidence: here, the appeal is from an order *granting* the motion. When there is a denial of the motion, the defendant still may object to the evidence when it is introduced in the trial and may appeal from a verdict against him. If, on the other hand, the motion to suppress is granted, the government cannot introduce the evidence, cannot appeal if it loses the case, and may be forever deprived of questioning the validity of the order. But on this score, the position of the government is no worse than in the usual case of an adverse ruling on a point of evidence during a criminal trial. There too the government would have no right of appeal. See *United States* v. *Rosenwasser*, 9 Cir., 1944, 245 F.2d 1015. There may be a difference between the grant and denial of a motion that works to the disadvantage of the government, but the effect of the difference cannot change the form and character of a motion as interlocutory or as final. *Carroll* v. *United States*, 1957, 354 U.S. 394, 404-06, 77 S.Ct. 1332, 1 L.Ed. 2d 1442. This difference between granting and denying a suppression order does point up the imbalance in the scales of justice, but it is up to Congress to make the correction. See Kronenberg, The Right of a State to Appeal in Criminal Cases, 49 J. Crim. L., C. & P.S. 473 (1959); Comment, The Right of State Appeal in Criminal Cases, [fol. 320] 9 Rutgers L. Rev. 545 (1955); Orfield, Criminal Appeals in America, pp. 61-64 (1939).

The United States argues that the issuance of the order by a court in a different district from that in which the trial will occur takes the case out of the general rule and beyond the reach of Zacarias.[8] Rule 41(e), Fed. R.

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[8] In Carroll v. United States, 1957, 354 U.S. 394, 403, 77 S.Ct. 332, 1 L.Ed. 2d 1442, the Supreme Court stated: "Earlier cases illustrated, sometimes without discussion, that under certain conditions, orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made prior to indictment, or in a different district from that in which the trial will occur. . . ." Carroll dealt with the appealability of an order granting a motion to suppress made *after indictment and in the district of trial.* Thus the language quoted above was not essential to the disposition of the case. To support the statement, the Court cited, in a footnote, only the case of Dier

Crim. P. provides:

> "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained . . . . The motion to suppress evidence may also be made in the district where the trial is to be had."

[fol. 321] There is nothing in this rule leading to the conclusion that if an order of suppression is rendered in the district of seizure it is necessarily "binding" in the district of trial, as the Government contends. Rule 41 (e) says nothing about the government's rights. Rule 41(e) may even be read to mean that the defendant has two bites at the apple, once in the district of seizure and once "also" in the district of trial. If Rule 41(e) is read as allowing a single hearing, rather than multiple hearings, there is still no language in the rule requiring that a suppression order be regarded as "final".

When we get down to the bare bones of the argument, we find the government contending that in the same district or circuit a pre-trial suppression order "binds" the trial judge and, a fortiori, the pre-trial suppression order of a district judge in Florida "binds" the district judge in Ohio charged with trying Koenig; therefore, the order

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v. Banton, 262 U.S. 147, 67 L.Ed. 915, 43 S.Ct. 533. In the Dier case the motion was made in federal court, but the criminal proceedings, if any, were to be brought in state court. The Receiver of the assets of an alleged bankrupt had in his possession the books and records of the bankrupt. Dier, the bankrupt, sought an injunction to prevent the Receiver from turning over these books and records to the District Attorney of New York County for use in a state grand jury proceeding on the ground that this would violate his constitutional privilege against self-incrimination. The lower court denied the motion. The Supreme Court heard the appeal without discussion of the issue of appealability. For several reasons, we consider the Dier case inapplicable to the instant case: the appeal was not by the government: the matter related only tangentially to a criminal case; and the motion possessed "sufficient independence from the main course of the prosecution to warrant treatment as [a] plenary order. . . " Carroll v. United States, *supra* at 403.

is final, and appealable. It is certainly proper that, generally, one judge, in coordinate jurisdiction with another judge, should not overrule that other.[9] But, as we read the cases, this matter is essentially one within the sound discretion of a trial judge conducting his court in the interest of furthering the administration of justice.[10] [fol. 322] In this Circuit, in *United States* v. *Brewer*, 24 F.R.D. 129 (N.D.Ga., 1959), the District Court for the Northern District of Georgia held that the defendants

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[9] "In federal practice, judges of coordinate jurisdiction, sitting in cases involving identical legal questions under the same facts and circumstances, should not reconsider the decisions of each other." Prack v. Weissenger, 4 Cir., 1960, 276 F.2d 446. See also Two Guys from Harrison-Allentown, Inc. v. McGinley, 3 Cir., 1959, 266 F.2d 427.

[10] The courts are in disagreement as to whether a ruling on a pre-trial motion to suppress is binding on the trial court. In United States v. Wheeler, 3 Cir., 1958, 256 F.2d 745, one district judge had denied a pre-trial suppression order, and a second judge, taking new testimony, had granted the order. The Court of Appeals held that it was a proper exercise of discretion to take new testimony, but an abuse of discretion to grant the order where the testimony was essentially the same as at the original hearing. The decision was based on the third circuit rule that "judges of coordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other" (TCF Flms v. Gourley, 3 Cir., 1957, 240 F.2d 711, 713). The rule is "designed to prevent shopping about by the defeated party for a judge more favorably disposed to whom a petition for reconsideration may be presented." United States v. Wheeler, 3 Cir., 1958, 256 F.2d 745, 748. The second Circuit took the opposite view in Dictograph v. Sonotone, 2 Cir., 1956, 230 F.2d 131 (not however involving Rule 41(e)): "[J]udicial sensibilities should play no part in suitors' rights." But see United States v. Klapholz, 2 Cir., 1956, 230 F.2d 494. In Waldron v. United States, D.C. Cir., 1955, 219 F.2d 37, 41, the court held: "It seems clear to us that a ruling on a motion to suppress evidence becomes a controlling rule in the case just as does a ruling made during the trial." Citing Waldron in a case where a motion to suppress was denied before trial and renewed at trial, Judge Holtzoff held that "a ruling denying a motion to suppress made before the trial under Rule 41(e) . . . becomes the law of the case and is binding on the trial court". United States v. Jennings, 1956, 19 F.R.D. 311, aff'd 247 F.2d 784. But see United States v. Jackson, 1957, 149 F. Supp. 937, rev'd on other ground, 250 F.2d 772.

could not bring motions to suppress evidence in the district of trial when the motions had been brought and denied in the district of seizure, the Middle District of Georgia. The Court stated that Rule 41(e) "is intended to provide for a hearing in either district, but does not require multiple hearings"; that "in the absence of exceptional circumstances" the ruling in the district of seizure is controlling. In *United States* v. *Lester*, 21 F.R.D. 30 (S.D.N.Y. 1957) the district court in New York held that a defendant, moving for suppression of evidence could not, as a matter of right, invoke the jurisdiction of the court of seizure. The court declined jurisdiction, leaving the defendant free to move for suppression in the district court of trial in Pennsylvania. "Such a course", the Second Circuit pointed out in *United States* v. *Klap-*
[fol. 323] *holz*, 1956, 230 F.2d 494, 497, "would have avoided invasion of the trial court's normal province to pass on the admissibility of evidence without jeopardy to the right of the defendants to the exclusion of evidence under the McNabb rule." In Klapholz the motion to suppress was based on Rule 5(a), Fed. R. Crim. P. There is no doubt, however, that a federal court has jurisdiction to entertain a motion to suppress evidence obtained within the district even though the offenses were committed in another district, and violated state law, not federal law. *Rea* v. *United States*, 1955, 350 U.S. 214, 76 S.Ct. 292, 100 L.Ed. 233.

Assuming, but without deciding, that the order of the court in the district of seizure is "binding", it is binding in the limited sense that Rule 41(e) represents an exception to the general rule that the trial court exercises exclusive control over the admission of evidence. The parties are bound, as they are to any rule of the case, subject to further orders of the Court. The trial judge having control over the conduct of a trial is not bound, if in the exercise of a sound discretion he would decide that exceptional circumstances require the admission of the evidence. Certainly, the order is not binding in the sense that it can transform an otherwise interlocutory order into a final order. And, an order to suppress has

no finality because it does not of itself terminate the criminal proceedings.[11]

[fol. 324] The Government's real objection here is that it will not have another opportunity to obtain review. That would be so even if the order were made by a district judge in the district of trial. *United States* v. *Wheeler*, 3 Cir., 1960, 275 F.2d 94; *United States* v. *Jennings*, (D.C. D.C. 1956) 19 F.R.D. 311, aff'd, D.C. Cir., 1957, 247 F.2d 784. Carroll answers this argument:

> "Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactory reviewable. In particular is this true of the Government in a criminal case. . . ."

If the Government is to be given an opportunity to appeal a suppression order in criminal cases, Congress should give it.[12]

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[11] In United States v. Ashby, 5 Cir., 1957, 247 F.2d 684, an order to suppress evidence effectually terminated the proceeding since the district court considered the indictment invalid as based on tainted evidence. This Court allowed an appeal in the course of which it was necessary to review the suppression order inseparably connected with the dismissal. But the appeal was from the dismissal of the indictment. In a similar case, United States v. Wheeler, 3 Cir., 1958, 256 F.2d 745, cert. den. 358 U.S. 873, the court stated that it was not allowing a roundabout appeal from a nonreviewable interlocutory order. The question of the validity of the indictment obtained as a result of presentation to the grand jury of evidence unlawfully acquired would not necessarily entail consideration of the different question of whether the evidence involved was subject to a suppression order.

[12] "If there is serious need for appeals by the Government from suppression orders, or unfairness to the interests of effective criminal law enforcement in the distinctions we have referred to, it is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases." Carroll v. United States, 1957, 354 U.S. 394, 407, 77 S.Ct. 1332, 1 L.Ed. 2d 1442.

In 1956 Congress took the affirmative step of allowing the Government to appeal pre-trial suppression orders in narcotics cases; in such cases a large part of the Government's evidence is obtained by seizure after arrest. 18 U.S.C.A. § 1404 (1958). A recent "Report of the Committee on the Judiciary, United

[fol. 325] This Court has no jurisdiction to hear the appeal from the order of suppression. The appeal is accordingly

DISMISSED.

States Senate, containing a Summary of the Findings and Recommendations of the Subcommittee on Improvements in the Federal Criminal Code" (S.R. Rep. No. 1478, 85 Cong., 2nd Sess., at p. 14) stated: "[S]uch appellate rights should not be restricted solely to narcotics cases. With stringent Federal rules governing searches and seizures, the absence of a statutory right of the Government to appeal from preliminary orders suppressing the evidence in other criminal cases is a serious handicap to Federal law enforcement authorities. . . . Ironically, the ultimate question of whether the district judge was right initially in suppressing the evidence cannot be determined, because the Government lack the right to appeal this preliminary ruling. . . . It is obvious that with 94 United States district courts, with 330 district judges, each having its own views as to what constitutes an illegal search, there never will be achieved any degree of uniformity in the Federal law until the Government is granted the right to appeal. Even judges within the same district are not in agreement as to what constitutes an unreasonable search. Where a search will be approved by one, it will be suppressed by another."

[fol. 326]

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No. 18355

UNITED STATES OF AMERICA

versus

DANIEL J. KOENIG

JUDGMENT—April 12, 1961

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in this cause be, and the same is hereby dismissed.

[fol. 327] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 328]

SUPREME COURT OF THE UNITED STATES

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ORDER ALLOWING CERTIORARI—Filed October 9, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 21 which case is also transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

★ U. S. GOVERNMENT PRINTING OFFICE 1961 017317 519

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No.

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL J. KOENIG

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit dismissing for lack of jurisdiction petitioner's appeal from that part of an order issued by the United States District Court for the Southern District of Florida which granted respondent's motion to suppress evidence.

OPINION BELOW

The opinion in the court of appeals (App., *infra*, pp. 13-26) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1961 (App., *infra*, p. 27). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an order suppressing evidence, entered subsequent to indictment on a motion made prior to indictment in a district other than that in which the indictment was returned and will be tried, is an appealable final order.

RULE INVOLVED

Rule 41(e), F. R. Crim. P.:

Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its

discretion may entertain the motion at the trial or hearing.

STATEMENT

Respondent was arrested by F.B.I. agents on September 29, 1959, in a rented house in Miami, Florida, which he occupied with his family (R. 60, 205, 283), and was charged with robbery on August 22, 1959, of a federally-insured bank in Yorkville, Ohio (R. 49, 65, 275-277). The arrest was based both upon a warrant of arrest issued in the Southern District of Ohio (later found to be based on an insufficient complaint) and information known to the arresting officers (later found to constitute probable cause). As an incident of the arrest, respondent's house was searched, and large sums of money, a .45 caliber Colt automatic pistol, and certain other items were seized (R. 75-77).

On October 9, 1959, a final hearing was held before the United States Commissioner of the Miami Division of the Southern District of Florida on the Ohio complaint, and on October 14, the commissioner recommended that a warrant of removal be issued (R. 9-11). On October 16, an indictment was returned against respondent in the District Court for the Southern District of Ohio (R. 17).

In the meantime, on October 12, respondent filed a "Motion to Suppress Evidence and Return Property" in the District Court for the Southern District of Florida (R. 2-6). On December 18, after three hearings on earlier dates (R. 43, 116, 267), the district court granted the motion to suppress but denied the motion for the return of property. The court made no findings of fact or conclusions of law, but found merely that

"the agents making the arrest without warrant had probable cause therefor but that the said search was unreasonable and in violation of the Fourth Amendment to the Constitution of the United States" (R. 37, 38).

On appeal by the government, the court of appeals dismissed the appeal for lack of jurisdiction (App., *infra*, p. 27). It rejected the government's contention that a motion to suppress brought prior to indictment in a district other than the one in which the indictment will be tried is an independent plenary proceeding, so that an order granting the motion is an appealable final order. It held instead that "[t]he crucial factor in deciding whether a suppression order is issued in an independent proceeding or is merely a step in the trial of a case, is the pendency of a criminal action in which the evidence sought to be suppressed may be used" (App., *infra*, p. 16); and that, if a criminal action is pending, "[o]rders suppressing evidence are then in the nature of a trial judge's rulings on admissibility of evidence" (App., *infra*, p. 18). The court then held, on the basis of its prior decision in *Zacarias* v. *United States*, 261 F. 2d 416 (C.A. 5), certiorari denied, 359 U.S. 935, that a criminal proceeding begins with the filing of a complaint and the holding of a commitment hearing, rather than with the filing of an indictment (App., *infra*, p. 19).

The court attached no significance to the fact that the order was entered in a district other than that in which the indictment was returned and to be tried. The statement by this Court in *Carroll* v. *United States*, 354 U.S. 394, 403, that "[e]arlier cases illustrated, sometimes without discussion, that under certain condi-

tions orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made * * * in a *different district* from that in which the trial will occur * * *" was dismissed as "not essential to the disposition of the case." *Dier* v. *Banton*, 262 U.S. 147, which the Court in *Carroll* cited in support of this proposition, was rejected as "inapplicable" (App., *infra*, pp. 21-22, note 8).

The court of appeals also suggested that the suppression order lacked "finality" because it is not "binding" on the court that will try the indictment, but did not explicitly so hold. It said first that the effect to be given to the order of suppression is a matter essentially "within the sound discretion of a trial judge" (App., *infra*, p. 23). It then stated that, even if the order has a binding effect, "it is binding in the limited sense that Rule 41(e) represents an exception to the general rule that the trial court exercises exclusive control over the admission of evidence," and that the "trial judge having control over the conduct of a trial is not bound, if in the exercise of a sound discretion he should decide that exceptional circumstances require the admission of the evidence" (App., *infra*, pp. 24-25).

REASONS FOR GRANTING THE WRIT

The actual criminal proceeding, *i.e.*, the federal inquiry into whether a crime was committed, is pending only in the Southern District of Ohio. The motion to suppress was a civil matter[1] brought and heard in

[1] The order from which the appeal was taken was in a proceeding designated No. 1667-M-Misc. in the District Court for the Southern District of Florida, while the indictment is designated Criminal No. 7558 in the Southern District of Ohio. A motion to suppress

the District Court for the Southern District of Florida, a court which had no jurisdiction over the criminal proceeding and had power only to rule on the motion to suppress and the warrant of removal. Nevertheless, the court of appeals held that the order entered by the District Court for the Southern District of Florida was not properly appealable as a final order made in an independent proceeding.

This decision is in direct and irreconcilable conflict with the rulings of other circuits. Moreover, the issue of the appealability of the determination of motions to suppress made before indictment is important to the administration of criminal justice. We submit therefore that this is an appropriate case for review by this Court.

1. There is now before the Court for hearing next term the question whether an order on a motion to suppress, made after complaint but before indictment, and determined after the return of an indictment in the same district, is a final order in an independent proceeding, so that the denial of such a motion is appealable by the defendant. The Second Circuit has ruled that such an order is final in *DiBella* v. *United States*, 284 F. 2d 897, pending on writ of certiorari, No. 574, this Term: Accord, *Cheng Wai* v. *United States*, 125 F. 2d 915 (C.A. 2); cf. *Freeman* v. *United States*, 160 F. 2d 69 (C.A. 9); *United States* v. *Sinciro*, 190 F. 2d 397 (C.A. 3). On the other hand, the Fifth Circuit has ruled to the contrary in *Saba* v. *United States*, 282 F. 255 (C.A. 5), pending on petition for a writ of cer-

brought by respondent's co-defendant which was decided in the latter district was also designated Criminal No. 7558, since it was part of the criminal proceedings.

tiorari, No. 643, this Term,[2] and *Zacarias* v. *United States*, 261 F. 2d 416 (C.A. 5), certiorari denied, 359 U.S. 935.[3] Accord, *United States* v. *Williams*, 227 F. 2d 149 (C.A. 4); *Nelson* v. *United States*, 208 F. 2d 505, 516-517 (C.A. D.C.), certiorari denied, 346 U.S. 827. The government supports the position of the Fifth Circuit on this aspect of the case. If this Court, however, should hold that the Second Circuit was correct in *DiBella* and that an order on a motion made before indictment is final and appealable by a defendant, regardless of the later return of an indictment in the same district, it follows *a fortiori* that it was error for the court below to dismiss the appeal by the government in this case. For here, not only was the motion made before indictment, but the proceeding and the order were in a district other than the one in which the indictment was later returned.

2. Even if the Court should agree with the position of the Fifth Circuit in the *Saba* case (with which the government concurs), we think that the appealability of an order on a motion to suppress made in a district other than the district of trial is, in itself, an important question of criminal procedure on which there is a conflict which should be authoritatively settled by this Court.

a. The decision below seems contrary to the reasoning of this Court in *Carroll* v. *United States*, 354

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[2] In the *Saba* case, the motion was made before an information was filed instead of before indictment, but this difference is not relevant to the issue here.

[3] In *Zacarias*, the denial of a motion to suppress was held not to be appealable even though the motion was made and acted upon before indictment.

U.S. 394. When the Court held that a suppression order entered after indictment in the district of trial is not an appealable final order, it explicity noted that there were decisions to the effect that an order entered "in a *different district* from that in which trial will occur" is final and appealable. *Id.* at 403. This statement was made as part of a general discussion concerning the type of orders relating to a criminal case which "possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders, and thus be appealable * * *." An order in a different district was compared to an order in the district of trial to demonstrate that the former contains aspects of independence that the latter lacks. While the statement in the *Carroll* opinion may technically be dictum, it was dictum that had an important bearing on the holding.

The statement in *Carroll* was based on the earlier holding of this Court in *Dier* v. *Banton*, 262 U.S. 147, which the court below erroneously characterized as "inapplicable." *Dier* involved a motion brought in a federal court to enjoin a federal official from turning the petitioner's books and records over to a state district attorney for use in a state grand jury proceeding. While two different sovereignties were involved, that case is like this one in that it involved a motion brought in one jurisdiction to enjoin the use of evidence in another. Moreover, *Carroll* is not the only case in which this Court cited *Dier* as authority for the appealability of an order rendered in another district. In *Cogen* v. *United States*, 278 U.S. 221, 225, *Dier* was cited as an example of "[t]he independent char-

acter of the summary proceedings * * * even where the motion is filed in a criminal case * * * wherever the criminal proceeding contemplated or pending is in another court."

b. The decision below is also in conflict with decisions of two other circuits holding that determinations of motions to suppress made in a district other than that of indictment are appealable. In *United States* v. *Sineiro*, 190 F. 2d 397 (C.A. 3), after a complaint and arrest warrant had been issued in the District of Maryland, the movant was arrested in the Eastern District of Pennsylvania and taken before the Commissioner in that district. He was held to appear in Maryland on the basis of a statement previously taken from him, to which he unsuccessfully objected. He then filed a motion in the Eastern District of Pennsylvania to quash the warrant and suppress the statement, but the motion was denied. The Third Circuit held that the movant could appeal the order, both because it was rendered prior to indictment or information and because the criminal proceedings were brought in a different district from that in which the motion was made. See *id.* at 399.

In *United States* v. *Klapholz*, 230 F. 2d 494 (C.A. 2), certiorari denied, 351 U.S. 924, the defendants, subsequent to their indictment in the Eastern District of New York, filed motions in the Southern District of New York to suppress evidence seized at the time of their arrest. The motions sought the suppression of evidence because of the alleged invalidity of the search warrant and because of an unnecessary delay in arraigning the defendants in violation of Rule 5(a),

F.R. Crim. P. The district court rejected the attack on the warrant, but granted in part and denied in part the motions based on Rule 5(a). The defendants appealed, and the government cross-appealed from the partial grant of the motions under Rule 5(a). The court of appeals heard all the appeals on their merits, citing *Dier* v. *Banton* as authority for the proposition that a motion to suppress brought in a different district from the district of trial constituted an independent proceeding. See 230 F. 2d at 498.[4]

c. While the court below refrained from actually holding that an order to suppress in a different district is not binding on the trial court, that concept is stated in the opinion and provides the underlying basis for the decision. This assumption involves a matter of perhaps even greater significance in criminal procedure than the question of appealability.

The "binding" quality of a suppression order seems apparent from the face of Rule 41(e), F.R. Crim. P., which provides that, if the motion to suppress is granted, the property which has been seized "shall not be admissible in evidence *at any hearing or trial*" (emphasis added). The interdiction that the Rule establishes would appear to have force and effect in every district, and not just in the district where the order is issued. Cf. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385; *Rea* v. *United States*, 350 U.S. 214; *United States* v. *Stephenson*, 223 F. 2d 336, 337 (C.A. D.C.); *Rodgers* v. *United States*, 158 F. Supp. 670, 680

[4] While the court's comment on *Dier* was made in regard to the motions under Rule 5(a), the same ruling applies to motions under Rule 41.

(S.D. Cal.), affirmed, 267 F. 2d 79 (C.A. 9).[5] If the order were not binding, there would be little purpose to the provision in Rule 41(e) allowing the motion to be brought in the district of seizure.

The only other opinion on this subject by a court of appeals, *United States* v. *Wheeler*, 256 F. 2d 745 (C.A. 3), certiorari denied, 358 U.S. 873, is basically contrary to the position of the court below (although the result is perhaps distinguishable on the ground that the successive orders were made by judges of the same court). There, a judge who had denied a motion to suppress assigned the petition for rehearing to another judge within the district, who issued a suppression order upon the basis of the same evidence heard by the first judge. The court of appeals reversed, holding that the decision of one judge can be reversed by another judge of coordinate jurisdiction only upon the basis of new evidence.[6]

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted. Since the questions involved are either directly related to or are in the area of the question of

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[5] *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 801-803, does not hold to the contrary. There, the particular facts of the case justified the holding that the suppression order was meant to apply only to the particular criminal action and did not preclude the use of the suppressed documents as evidence in subsequent civil actions.

[6] *Wheeler* was followed in *United States* v. *Brewer*, 24 F.R.D. 129 (N.D. Ga.), which held that a motion to suppress which was denied in the district of seizure could not be brought again in the district of trial.

appealability involved in *DiBella* v. *United States*, No. 574, this term, in which certiorari has been granted, it is respectfully suggested that this case be heard at the same time as the *DiBella* case.

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MAY 1961.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18355

UNITED STATES OF AMERICA, APPELLANT,

versus

DANIEL J. KOENIG, APPELLEE.

Appeal from the United States District Court for the Southern District of Florida.

(April 12, 1961.)

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The scales of justice are not always evenly balanced; one of the scales holds a few extra weights in favor of a person accused of crime. This appeal deals with one of those weights: the limited jurisdiction of this Court to hear a government appeal from an order of a district court suppressing evidence.[1] For purposes of the appeal, two

[1] September 10, 1959, F.B.I. agents arrested Daniel J. Koenig in Miami, Florida, on a faulty arrest warrant and on probable cause based on a teletype communication from Ohio that a complaint had been filed against Koenig charging him with a bank robbery. After Koenig's arrest, agents searched the house he rented, his garage, and his automobile. They seized, among other things, an attache case containing $13,190, a 45 calibre blue steel Colt automatic, a masquerade make-up kit, a box containing forty coin-wrappers, two rolls of pennies with fifty pennies in each roll, and other articles including a black ceramic cat containing $340. October 9, 1959, the United States Commissioner at Miami held a final hearing on the Ohio complaint. October 12 Koenig filed a motion in the District Court for the Southern District of Florida, under Rule 41(e), Fed. R. Crim. P., for the suppression of the

elements in the case are important. (1) The defendant filed his motion to suppress before he was indicted, but after a complaint was issued against him and after a commitment hearing before the United States Commissioner. (2) The suppression order was issued in a district different from the district in which the defendant was indicted and will be tried. We hold that the order is not appealable. *Zacarias* v. *United States*, 5 Cir., 1958, 261 F.2d 416, cert. den. 359 U.S. 935, 79 S.Ct. 650, 3 L.Ed. 2d 637, controls our decision.

Government appeals in criminal cases are exceptional and are not favored by the courts. *Carroll* v. *United States*, 1957, 354 U.S. 394, 400, 77 S.Ct. 1332, 1 L.Ed. 2d 1442. Such appeals must be based on express statutory authority; the government had no right of appeal at common law. *United States* v. *Sanges*, 1892, 144 U.S. 310, 12 S.Ct. 609, 36 L.Ed. 445; *United States* v. *Janitz*, 3 Cir., 1947, 161 F.2d 19; *United States* v. *Rosenwasser*, 9 Cir., 1944, 145 F.2d 1015. See Orfield, Criminal Appeals in America, p. 58 (1939).

The primary statutory authority for government appeals in criminal cases, 18 U.S.C.A. 3731, does not specifically include appeals from orders suppressing

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seized property and for the return of the property. Two days later, the Commissioner filed his written findings and recommendation that a warrant of removal of Koenig be entered. October 16, four days after the motion to suppress was filed, an indictment was returned against Koenig in the Southern District of Ohio. December 18, 1959, after three hearings on earlier dates, the district court in Florida granted Koenig's motion to suppress the evidence and denied the motion for return of the property. The court held that the F.B.I. agents had probable cause to make the arrest without a warrant, but that the search was unreasonable and violative of the Fourteenth Amendment. The Government appeals from that order denying the motion to suppress; the defendant has not appealed from denial of the motion for return of the property. We do not discuss the reasonableness of the search and seizure, because of our holding that the order is not appealable.

evidence.[2] The Judicial Code, however, does authorize appeals from "all *final* decisions of the district courts . . . except where a direct review may be had in the Supreme Court." 28 U.S.C.A. § 1291. The appealability of an order suppressing evidence depends, therefore, upon whether it is "final".[3] Orders in an inciden-

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[2] "An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances: From a decision of judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section. From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section. The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted." 18 U.S.C.A. §3731.

[3] In criminal cases a final judgment or order may be reviewed by way of immediate appeal or writ of error, but absent special statutory authorization an interlocutory order cannot be so reviewed. See 6 Moore, Federal Practice, ¶54.11, 54.12, 54.14, 54.16; 2 Am.Jur., Appeal & Error, § 21. The final judgment as a basis for appeal is an historic concept, the modern rationale of which is to prevent congestion in the appellate courts. See Crick, The Final Judgment as a Basis for Appeal, 41 Yale L.J. 539 (1932). Crick suggests that upon analysis the "final judgment" rule causes as much labor as it saves, however, since it requires repeated litigation to determine what is and what is not a final judgment. Id. at 557-63. This case offers additional evidence to substantiate his thesis. Nevertheless the function of the rule is to avoid piecemeal litigation and the delays caused by interlocutory appeals. See 6 Moore, Federal Practice, ¶54.11; Lewis v. E. I. DuPont de Nemours & Co., 5 Cir., 1950, 183 F.2d 29. "Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations

tal ancillary proceeding to a criminal action are interlocutory and non-appealable; orders in independent plenary proceedings are final and appealable. *United States* v. *Wallace & Tiernan Co.*, 1949, 336 U.S. 793, 69 S.Ct. 824, 93 L.Ed. 1042; *Cogen* v. *United States*, 1929, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275; *United States* v. *Ponder*, 4 Cir., 1956, 238 F.2d 825. See 6 Moore, Federal Practice, ¶ 54.14.

The crucial factor in deciding whether a suppression order is issued in an independent proceeding or is merely a step in the trial of a case, is the pendency of a criminal action in which the evidence sought to be suppressed may be used.[4] If there is no criminal proceeding pending, a motion for suppression of evidence and the return of such (evidential) property is an independent civil suit. But at what stage does a criminal proceeding begin? The courts of appeal have reached various answers.[5]

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of policy are especially compelling in the administration of criminal justice." Mr. Justice Frankfurter in Cobbledick v. United States, 1940, 309 U.S. 323, 325, 60 S.Ct. 540, 84 L.Ed. 783.

[4] As Judge Tuttle states the test in Zacarias v. United States, 5 Cir., 1958, 261 F.2d 416, 417, cert. den. 359 U.S. 935, the answer to the question whether an order to suppress evidence is final or interlocutory is found by determining whether the motion was made in "an independent civil proceeding, finally terminated with the order denying [or granting] the relief or is ancillary to a pending criminal proceeding." The time at which the motion was made, rather than the time as which it is passed upon by the court, controls in determining the character of the proceeding. Cogen v. United States, 278 U.S. 221, 49 S. Ct. 118, 73 L.Ed. 275; United States v. Poller, 2 Cir., 1930, 43 F.2d 911.

[5] *Second Circuit:* Cheng Wai v United States, 2 Cir., 1942, 125 F. 2d 915 (before indictment, order appealable); United States v. Poller, 2 Cir., 1930, 43 F.2d 911 (after proceedings before commissioner, but before indictment; order appealable).

Third Circuit: United States v. Wheeler, 3 Cir., 1958, 256 F.2d 745, cert. den. 358 U.S. 873 (after indictment, order appealable; United States v. Pack, 3 Cir., 1957, 247 F.2d 168 (after indictment and dismissal, order not appealable); United States v. Bianco, 3

The filing of an information or an indictment is frequently accepted as the dividing-line to mark the beginning of criminal proceedings. See Orfield, Criminal Procedure from Arrest to Appeal, pp. 204-208 (1947). The difficulty here is that at the time Koenig

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Cir., 1951, 189 F.2d 716 (before indictment, order appealable); United States v. Jantz, 3 Cir., 1947, 161 F.2d 19 (after indictment, order not appealable); Re Sana Laboratories, Inc., 3 Cir., 1940, 115 F.2d 717, cert. den. sub. nom. Sana Laboratories, Inc. v. United States, 1941, 312 U.S. 688 (after indictment, order appealable).

Fourth Circuit: United States v. Ponder, 4 Cir., 1956, 238 F.2d 825, noted in 35 No. Car. L. Rev. 501 (1957) (after indictment, order appealable); United States v. Williams, 4 Cir., 1955, 227 F.2d 149 (before indictment, order not appealable).

Fifth Circuit: Zacarias v. United States, 5 Cir., 1958, 261 F.2d 416, cert. den. 359 U.S. 935 (before indictment, order not appealable); United States v. Ashby, 5 Cir., 1957, 245 F.2d 684 (after indictment and dismissal, order appealable); Davis v. United States, 5 Cir., 1943, 138 F.2d 406 (hearing before Grand Jury, order appealable); Turner v. Camp, 5 Cir., 1941, 123 F.2d 840 (summary proceeding against prosecuting officer, order appealable).

Sixth Circuit: Dowling v. Collins, 6 Cir., 1926, 10 F. 2d 62 (criminal case pending, order nevertheless appealable).

Seventh Circuit: United States v. One Plymouth Sedan Automobile, 7 Cir., 1948, 169 F.2d 3 (after indictment, order not appealable).

Ninth Circuit: United States v Sugden, 9 Cir., 1955, 226 F.2d 281, aff'd mem., 1956, 351 U.S. 916 (after indictment and dismissal, order appealable); Weldon v. United States, 9 Cir., 1952, 196 F.2d 874 (before indictment or information, after complaint, arrest, and arraignment; if order effective, appealable); Freeman v. United States, 9 Cir., 1946, 160 F.2d 69 (after complaint and hearing before Commissioner, but before indictment, order appealable); United States v. Rosenwasser, 9 Cir., 1944, 145 F.2d 1015 (after first trial, before new trial, order not appealable).

District of Columbia Circuit: United States v. Stephenson, D.C. Cir., 1955, 223 F.2d 336 (after indictment, order not appealable); Nelson v. United States, D.C. Cir., 1953, 208 F.2d 505, cert. den. 346 U.S. 827 (before indictment, order not appealable); United States v. Cefarvatti, D.C. Cir., 1952, 202 F.2d 13, noted in 21 Geo. Wash. L. Rev. 631, 39 Va. L. Rev. 103, 41 Geo. L. J. 259 (after indictment, order appealable). See Friedenthal, Government Appeals in Federal Criminal Cases, 12 Stan. L. Rev. 71, 83-102 (1959); note, 106 U. Pa. L. Rev. 612 (1958).

filed his motion, there was no way of knowing positively that he would be indicted. In *Post* v. *United States*, 1894, 161 U.S. 583, 587, 16 S.Ct. 611, 40 L.Ed. 816, (not, however, involving a motion to suppress) the Supreme Court said:

> "Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate. [citations omitted]. The submission of a bill of indictment by the attorney for the government to the grand jury, and the examination of witnesses before them, are both in secret, and are no part of the criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commended; the grand jury may ignore the bill, and decline to find any indictment; and it cannot be known whether any proceedings will be instituted against the accused until an indictment against him is presented in open court."

When the motion to suppress is made *after* indictment the order is considered interlocutory and neither the defendant nor the government may appeal from it, because the question whether the accused would be indicted has been resolved and motions related to the suppression of evidence are integrally related to the criminal proceeding. *Carroll* v. *United States*, 1957, 354 U.S. 394, 77 S.Ct. 1332, 1 L.Ed. 2d 1442 (government's right to appeal); *Cogen* v. *United States*, 1929, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275 (defendant's right to appeal). Orders suppressing evidence are then in the nature of a trial judge's rulings on admissibility of evidence. Even when the motion results in dismissal

of the indictment for lack of evidence, the order is not final and hence not appealable. *Carroll* v. *United States*, 1957, 354 U.S. 394, 77 S.Ct. 1332, 1 L.Ed. 2d 1442. But where the motion is made by the applicant *before* an information or indictment is found or returned against him, some courts—and we recognize the force of their arguments—treat the proceeding as independent and the resulting order final and appealable. *Go-Bart Importing Co.* v. *United States*, 1931, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 344; *Burdeau* v. *McDowell*, 1920, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048; *Perlman* v. *United States*, 1918, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950; *Davis* v. *United States*, 5 Cir., 1943, 138 F.2d 406; *Cheng Wai* v. *United States*, 2 Cir., 1942, 125 F.2d 915.

This Court has drawn the line at a stage earlier than indictment. *Zacarias* v. *United States*, 5 Cir., 1958, 261 F.2d 416, cert. den. 359 U.S. 935, 79 S.Ct. 650, 3 L.Ed. 2d 637.[6] This Court treats an indictment, once made, as relating back, at least to the extent that when an indictment has been returned, an order to suppress, following on the heels of a complaint and a commitment hearing, is treated as one step in a series of steps constituting the criminal proceeding. In Zacarias the defendant's motion to suppress was filed and denied before indictment.[6] A complaint had been issued by a United States Commissioner, a commitment hearing had been held, and Zacarias was already bound over to the district court. This Court refused to allow an appeal by the defendant, on the ground that the order denying his motion was interlocutory. Koenig is in no different situation from Zacarias. Here, a

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[6] See also Saba v. United States, 5 Cir., 1960, 282 F.2d 255, and Peterson v. United States, 5 Cir., 1958, 260 F.2d 265, in which cases, however, the motion to suppress was filed after indictment. See United States v. Williams, 4 Cir., 1955, 227 F.2d 149, cited with approval in Zacarias.

complaint and a warrant had been issued, the Commissioner had held a full preliminary hearing, the Commissioner had announced oral findings recommending that Koenig be removed to the district court in the Southern District of Ohio, and the district court reached its decision on suppressing the evidence four months after Koenig had been under indictment. In the light of Zacarias, Koenig's motion to suppress was not an independent action but simply an early step in the criminal case against him.[7]

The fact that the motion for the return of property was denied, while the motion to suppress was granted, so that the property remains in the possession of the court, adds some weight to the view that the order appealed from is interlocutory. Cf. *United States* v. *Rosenwasser,* 9 Cir., 1944, 145 F.2d 1015, 1017; *Carroll* v. *United States, supra* at p. 404, n. 17.

The Government seeks to distinguish Zacarias on the ground that the Zacarias appeal was from an order *denying* a defendant's motion to suppress evidence; here, the appeal is from an order *granting* the motion. When there is a denial of the motion, the defendant still may object to the evidence when it is introduced in the trial and may appeal from a verdict against him. If, on the other hand, the motion to suppress is granted, the government cannot introduce the evidence, cannot appeal if it loses the case, and may be forever deprived of questioning the validity of the order. But on this

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[7] "However, we think it quite plain that after a complaint has been issued by a United States Commissioner, the accused has been afforded a commitment hearing at which he is permitted to cross examine the prosecuting witnesses and to testify, if he so desires, in his own behalf, and is then, in the language of the statute '[held] to answer in the district court,' a motion thereafter made under Rule 41(e) is incidental to the criminal proceeding already commenced and pending. An order on such motion is not final; it is interlocutory and is not appealable." Zacarias v. United States, 5 Cir., 1958, 261 F.2d 416, 418.

score, the position of the government is no worse than in the usual case of an adverse ruling on a point of evidence during a criminal trial. There too the government would have no right of appeal. See *United States* v. *Rosenwasser*, 9 Cir. 1944, 245 F.2d 1015. There may be a difference between the grant and denial of a motion that works to the disadvantage of the government, but the effect of the difference cannot change the form and character of a motion as interlocutory or as final. *Carroll* v. *United States*, 1957, 354 U.S. 394, 404-406, 77 S.Ct. 1332, 1 L.Ed. 2d 1442. This difference between granting and denying a suppression order does point up the imbalance in the scales of justice, but it is up to Congress to make the correction. See Kronenberg, The Right of a State to Appeal in Criminal Cases, 49 J. Crim. L., C. & P.S. 473 (1959); Comment, The Right of State Appeal in Criminal Cases, 9 Rutgers L. Rev. 545 (1955); Orfield, Criminal Appeals in America, pp. 61-64 (1939).

The United States argues that the issuance of the order by a court in a different district from that in which the trial will occur takes the case out of the general rule and beyond the reach of Zacarias.[8] Rule

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[8] In Carroll v. United States, 1957, 354 U.S. 394, 403, 77 S.Ct. 332, 1 L.Ed. 2d 1442, the Supreme Court stated: "Earlier cases illustrated, sometimes without discussion, that under certain conditions, orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made prior to indictment, or in a different district from that in which the trial will occur. . . ." Carroll dealt with the appealability of an order granting a motion to suppress made *after indictment, and in the district of trial*. Thus the language quoted above was not essential to the disposition of the case. To support the statement, the Court cited, in a footnote, only the case of Dier v. Banton, 262 U.S. 147, 67 L.Ed. 915, 43 S.Ct. 533. In the Dier case the motion was made in federal court, but the criminal proceedings, if any, were to be brought in state court. The Receiver of the assets of an alleged bankrupt had in his possession the books and records of the bankrupt. Dier, the bankrupt, sought an injunction to prevent the

41(e), Fed. R. Crim. P. provides:

> "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained . . . . The motion to suppress evidence may also be made in the district where the trial is to be had."

There is nothing in this rule leading to the conclusion that if an order of suppression is rendered in the district of seizure it is necessarily "binding" in the district of trial, as the Government contends. Rule 41(e) says nothing about the government's rights. Rule 41(e) may even be read to mean that the defendant has two bites at the apple, once in the district of seizure and once "also" in the district of trial. If Rule 41(e) is read as allowing a single hearing, rather than multiple hearings, there is still no language in the rule requiring that a suppression order be regarded as "final".

When we get down to the bare bones of the argument, we find the government contending that in the same district or circuit a pre-trial suppression order "binds" the trial judge and, a fortiori, the pre-trial suppression order of a district judge in Florida "binds" the district judge in Ohio charged with trying Koenig; therefore, the order is final, and appealable. It is cer-

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Receiver from turning over these books and records to the District Attorney of New York County for use in a state grand jury proceeding on the ground that this would violate his constitutional privilege against self-incrimination. The lower court denied the motion. The Supreme Court heard the appeal without discussion of the issue of appealability. For several reasons, we consider the Dier case inapplicable to the instant case: the appeal was not by the government; the matter related only tangentially to a criminal case; and the motion possessed "sufficient independence from the main course of the prosecution to warrant treatment as [a] plenary order. . . ." Carroll v. United States, *supra* at 403.

tainly proper that, generally, one judge, in coordinate jurisdiction with another judge, should not overrule that other.[9] But, as we read the cases, this matter is essentially one within the sound discretion of a trial judge conducting his court in the interest of furthering the administration of justice.[10]

In this Circuit, in *United States* v. *Brewer*, 24 F.R.D.

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[9] "In federal practice, judges of coordinate jurisdiction, sitting in cases involving identical legal questions under the same facts and circumstances, should not reconsider the decisions of each other." Prack v. Weissenger, 4 Cir., 1960, 276 F.2d 446. See also Two Guys from Harrison-Allentown, Inc. v. McGinley, 3 Cir., 1959, 266 F.2d 427.

[10] The courts are in disagreement as to whether a ruling on a pre-trial motion to suppress is binding on the trial court. In United States v. Wheeler, 3 Cir., 1958, 256 F.2d 745, one district judge had denied a pre-trial suppression order, and a second judge, taking new testimony, had granted the order. The Court of Appeals held that it was a proper exercise of discretion to take new testimony, but an abuse of discretion to grant the order where the testimony was essentially the same as at the original hearing. The decision was based on the third circuit rule that "judges of coordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other" (TCF Films v. Gourley, 3 Cir., 1957, 240 F.2d 711, 713). The rule is "designed to prevent shopping about by the defeated party for a judge more favorably disposed to whom a petition for reconsideration may be presented." United States v. Wheeler, 3 Cir., 1958, 256 F.2d 745, 748. The second Circuit took the opposite view in Dictograph v. Sonotone, 2 Cir., 1956, 230 F.2d 131 (not however involving Rule 41(e)): "[J]udicial sensibilities should play no part in suitors' rights." But see United States v. Klapholz, 2 Cir., 1956, 230 F.2d 494. In Waldron v. United States, D.C. Cir., 1955, 219 F.2d 37, 41, the court held: "It seems clear to us that a ruling on a motion to suppress evidence becomes a controlling rule in the case just as does a ruling made during the trial." Citing Waldron in a case where a motion to suppress was denied before trial and renewed at trial, Judge Holtzoff held that "a ruling denying a motion to suppress made before the trial under Rule 41(e) . . . becomes the law of the case and is binding on the trial court". United States v. Jennings, 1956, 19 F.R.D. 311, aff'd 247 F.2d 784. But see United States v. Jackson, 1957, 149 F. Supp. 937, rev'd on other ground, 250 F.2d 772.

129 (N.D.Ga., 1959), the District Court for the Northern District of Georgia held that the defendants could not bring motions to suppress evidence in the district of trial when the motions had been brought and denied in the district of seizure, the Middle District of Georgia. The Court stated that Rule 41(e) "is intended to provide for a hearing in either district, but does not require multiple hearings"; that "in the absence of exceptional circumstances" the ruling in the district of seizure is controlling. In *United States* v. *Lester*, 21 F.R.D. 30 (S.D.N.Y. 1957) the district court in New York held that a defendant, moving for suppression of evidence could not, as a matter of right, invoke the jurisdiction of the court of seizure. The court declined jurisdiction, leaving the defendant free to move for suppression in the district court of trial in Pennsylvania. "Such a course", the Second Circuit pointed out in *United States* v. *Klapholz*, 1956, 230 F.2d 494, 497, "would have avoided invasion of the trial court's normal province to pass on the admissibility of evidence without jeopardy to the right of the defendants to the exclusion of evidence under the McNabb rule." In Klapholz the motion to suppress was based on Rule 5(a), Fed. R. Crim. P. There is no doubt, however, that a federal court has jurisdiction to entertain a motion to suppress evidence obtained within the district, even though the offenses were committed in another district, and violated state law, not federal law. *Rea* v. *United States*, 1955, 350 U.S. 214, 76 S.Ct. 292, 100 L.Ed. 233.

Assuming, but without deciding, that the order of the court in the district of seizure is "binding", it is binding in the limited sense that Rule 41(e) represents an exception to the general rule that the trial court exercises exclusive control over the admission of evi-

dence. The parties are bound, as they are to any rule of the case, subject to further orders of the Court. The trial judge having control over the conduct of a trial is not bound, if in the exercise of a sound discretion he should decide that exceptional circumstances require the admission of the evidence. Certainly, the order is not binding in the sense that it can transform an otherwise interlocutory order into a final order. And, an order to suppress has no finality because it does not of itself terminate the criminal proceedings.[11]

The Government's real objection here is that it will not have another opportunity to obtain review. That would be so even if the order were made by a district judge in the district of trial. *United States* v. *Wheeler*, 3 Cir., 1960, 275 F.2d 94; *United States* v. *Jennings*, (D.C.D.C. 1956) 19 F.R.D. 311, aff'd, D.C. Cir., 1957, 247 F.2d 784. Carroll answers this argument:

> "Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactorily reviewable. In particular is this true of the Government in a criminal case. . . ."

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[11] In United States v. Ashby, 5 Cir., 1957, 247 F.2d 684, an order to suppress evidence effectually terminated the proceeding since the district court considered the indictment invalid as based on tainted evidence. This Court allowed an appeal in the course of which it was necessary to review the suppression order inseparably connected with the dismissal. But the appeal was from the dismissal of the indictment. In a similar case, United States v. Wheeler, 3 Cir., 1958, 256 F.2d 745, cert. den. 358 U.S. 873, the court stated that it was not allowing a roundabout appeal from a nonreviewable interlocutory order. The question of the validity of the indictment obtained as a result of presentation to the grand jury of evidence unlawfully acquired would not necessarily entail consideration of the different question of whether the evidence involved was subject to a suppression order.

If the Government is to be given an opportunity to appeal a suppression order in criminal cases, Congress should give it.[12]

This Court has no jurisdiction to hear the appeal from the order of suppression. The appeal is accordingly

DISMISSED.

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[12] "If there is serious need for appeals by the Government from suppression orders, or unfairness to the interests of effective criminal law enforcement in the distinctions we have referred to, it is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases." Carroll v. United States, 1957, 354 U.S. 394, 407, 77 S.Ct. 1332, 1 L.Ed. 2d 1442.

In 1956 Congress took the affirmative step of allowing the Government to appeal pre-trial suppression orders in narcotics cases; in such cases a large part of the Government's evidence is obtained by seizure after arrest. 18 U.S.C.A. §1404 (1958). A recent "Report of the Committee on the Judiciary, United States Senate, containing a Summary of the Findings and Recommendations of the Subcommittee on Improvements in the Federal Criminal Code" (S.R. Rep. No. 1478, 85 Cong., 2nd Sess., at p. 14) stated: "[S]uch appellate rights should not be restricted solely to narcotics cases. With stringent Federal rules governing searches and seizures, the absence of a statutory right of the Government to appeal from preliminary orders suppressing the evidence in other criminal cases is a serious handicap to Federal law enforcement authorities. . . . Ironically, the ultimate question of whether the district judge was right initially in suppressing the evidence cannot be determined, because the Government lacks the right to appeal this preliminary ruling. . . . It is obvious that with 94 United States district courts, with 330 district judges, each having its own views as to what constitutes an illegal search, there never will be achieved any degree of uniformity in the Federal law until the Government is granted the right to appeal. Even judges within the same district are not in agreement as to what constitutes an unreasonable search. Where a search will be approved by one, it will be suppressed by another."

JUDGMENT

Extract from the Minutes of April 12, 1961

No. 18355

UNITED STATES OF AMERICA,

versus

DANIEL J. KOENIG

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in this cause be, and the same is hereby dismissed.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 594597 1966

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 93

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL J. KOENIG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 17–29) is reported at 290 F. 2d 166.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1961 (R. 30). The petition for a writ of certiorari was filed on May 17, 1961, and was granted on October 9, 1961 (R. 30). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner moved for the return and suppression of property prior to indictment in the district of seizure which was different from the district in which the indictment was subsequently returned and will be

tried. Petitioner's right to most of the property depending on the outcome of the criminal trial and his interest in the other property was insubstantial. The question presented is whether the proceedings upon the motion were independent of the criminal case and therefore the order of the district court suppressing the evidence was an appealable final order.

STATUTE AND RULE INVOLVED

Section 1291 of Title 28 U.S.C. provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Rule 41(e), F.R. Crim. P., provides:

> *Motion for Return of Property and to Suppress Evidence.*
>
> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evi-

dence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

Respondent was arrested by F.B.I. agents on September 29, 1959, in a rented house in Miami, Florida, which he occupied with his family (R. 1–2; Tr.[1] 60, 205, 283), and was charged with robbery on August 22, 1959, of a federally-insured bank in Yorkville, Ohio (R. 4, 7–8; Tr. 49, 65, 275–277). The arrest was based both upon a warrant of arrest issued in the Southern District of Ohio (later found to be based on an insufficient complaint) and information known to the arresting officers (later found to constitute probable cause). As an incident of the arrest, respondent's house was searched, and large sums of money, a .45-caliber Colt automatic pistol, and certain other items were seized (R. 14; Tr. 75–77).

On October 9, 1959, a final hearing was held before the United States Commissioner of the Miami Division of the Southern District of Florida on the Ohio com-

[1] "Tr." refers to the transcript in the court of appeals which has been filed with the Clerk of this Court.

plaint, and on October 14, the commissioner recommended that a warrant of removal be issued (R. 4–5). On October 16, an indictment was returned against respondent in the District Court for the Southern District of Ohio (R. 9).

In the meantime, on October 12, respondent filed a "Motion to Suppress Evidence and Return Property" in the District Court for the Southern District of Florida (R. 1–3). On December 18, after three hearings on earlier dates (Tr. 43, 116, 267), the district court granted the motion to suppress but denied the motion for the return of property. The court made no findings of fact or conclusions of law, but found merely that "the agents making the arrest without warrant had probable cause therefor but that the said search was unreasonable and in violation of the Fourth Amendment to the Constitution of the United States" (R. 15–16). The government filed a notice of appeal to the court of appeals on January 18, 1960 (R. 16), and on April 12, 1961, that court dismissed the appeal for lack of jurisdiction on the ground that it was an interlocutory order in a criminal case (R. 30).

SUMMARY OF ARGUMENT

The issue in this case is the appealability of an order granting respondent's motion to suppress which was filed in the district where the property was seized, not the district where the indictment was subsequently returned. In our petition for certiorari, we contended that the decision of the court of appeals dismissing an appeal from the order was erroneous. On recon-

sideration, however, we have concluded that the contentions in our petition were either erroneous or not conclusive; we now believe that the court below was correct and the order is not appealable.

I

The order in the instant case, under the principles we suggest in *Di Bella* v. *United States,* No. 21, this Term, would not have been appealable if it had been made in the district of trial. The major property involved is approximately 14,000 dollars which the government alleges and intends to prove at the trial were stolen. Since respondent's right to this property depends on the outcome of the criminal case, his motion seeking suppression and return of the property is in actuality merely a motion to suppress. As such, it is a part of the criminal case and is not appealable. Respondent's property interest in the other property seized is so insubstantial that his motion for the return of this property likewise does not constitute an independent proceeding determining the right to valuable property. In short, under the standards we suggest in *Di Bella,* respondent's motion was not independent of the criminal case and the court's order was not final and not appealable.

On the other hand, if we are wrong in our contentions in *Di Bella* and a motion filed before indictment in the district of seizure is independent of the criminal case, then, *a fortiori,* a motion filed before indictment in another district is independent and an order deciding the motion is final and appealable.

II

When the motion is brought before indictment in the district of seizure, as here, the same considerations govern appealability as apply to an identical order on a motion brought before indictment in the district of trial (the situation involved in *Di Bella*).

A. The appealability of an order depends upon whether it is "an independent proceeding or merely a step in the criminal case"; and this question depends in turn upon the "essential character [of the motion] and the circumstances under which it is made." *Carroll* v. *United States*, 354 U.S. 394, 404, note 17. The "essential character and the circumstances" are, first, the real purpose for which the motion was brought and, second, the kind of property involved. These factors remain the same whether the motion is brought in the district of trial or in the district of seizure.

There is no practical or legal bar to treating motions made in one district as part of a criminal case in another, for all district courts are part of a single federal judicial system and the same basic substantive and procedural law applies throughout. The integral relationship between motions made in one district and a criminal case in another is shown by the fact that motions under Rule 41(e) are often transferred from the district of seizure to the district of trial. It is also shown by the fact that all, or almost all, motions brought before indictment in the district of trial were brought there because it was the district of seizure. Rule 41(e) allows motions to be brought in the dis-

trict of seizure or of trial, and the latter is not determined until the indictment is returned. It would certainly be anomalous to apply the principles we suggest in *Di Bella* to a motion in the district of seizure merely because it becomes the district of trial, but not to identical motions in the district of seizure where the indictment is returned in another district.

B. This Court has noted in one-line descriptions of the existing law in *Cogen* v. *United States*, 278 U.S. 221, 225, and *Carroll* v. *United States, supra*, 354 U.S. at 403–404, where these issues were not before it, that orders brought before indictment in the district of trial and all motions brought other than in the district of trial are appealable. But these summary statements are based on decisions which do not, on examination, support them. Thus, the statement that an order brought in a district other than that of trial is appealable rests solely upon *Dier* v. *Banton*, 262 U.S. 147, which involved two separate sovereignties, and not merely, as here, two different courts within the same judicial system. While an order to suppress in one federal court can be part of a criminal case in another district since it is part of the same judicial system, an order in a federal court is necessarily independent and final with regard to a criminal case in a state court. Moreover, *Dier* v. *Banton* was decided at a time when the courts were generous in allowing appeals partly because of the desirability of settling the new procedures on motions to suppress, partly because there were doubts whether the effect of orders made upon such motions might not be *res judicata*, and

partly because there was less awareness than there is today of the problem of appealability.

The principle disfavoring fragmentary and nonterminal appeals applies to the situation here with the same force as in *Di Bella*. In both types of situations appeals will cause delay in the trial. Recent decisions of this Court indicate that such mechanical tests of appealability as the time of the motion or the place where it is brought should not be applied. *Carroll* v. *United States*, *supra*, 354 U.S. at 404; *United States* v. *Wallace Co.*, 336 U.S. 793, 802.

III

If the admissibility of the property as evidence is *res judicata* in the district of trial because of the order in the district of seizure—in short, if the trial judge were bound by the order—the order would be appealable. Under *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, and *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684, an order is independently appealable if it finally adjudicates an important right of a litigant and is not an integral part of the main litigation. However, when an order under Rule 41(e) is not final, it is not *res judicata*. We believe the latter rule to govern here.

Rule 41(e) and the prevailing judicial decisions show that the order below was not absolutely binding on the trial court. In *Gouled* v. *United States*, 255 U.S. 298, 312–313, this Court held that an order deciding a pretrial motion is subject to reconsideration by the trial court. The lower courts uniformly have held that an order on a pretrial motion in the district of trial can be reconsidered by the trial court

(though there is some dispute as to the scope of the reconsideration). Thus, it is clear that interlocutory orders on pretrial motions in the district of trial are not *res judicata*; indeed, since the cases do not discuss whether the order is final or not, it appears that even final pretrial orders are not absolutely binding on the trial court. Since, as we have seen, orders in the district of seizure have the same relationship to the criminal case as orders in the district of trial, the same rule as to *res judicata* should apply to both.

The only possible basis for differentiating between the *res judicata* effect of orders in the district of seizure and in the district of trial is Rule 41(e). That rule provides that if a motion to suppress in the district of seizure is granted, the property "shall not be admissible in evidence at any hearing or trial." We do not think that this provision makes orders granting motions to suppress *res judicata*, while orders denying such motions are not. Normally *res judicata* applies equally to both parties. Otherwise, only the government would be bound and only the government could appeal, while the defendant could not. A subsequent provision in Rule 41(e) allows trial courts in their discretion to entertain motions to suppress. This provision has been interpreted by the courts to allow consideration of motions under Rule 41(e) not only where no motion has been made before trial but also where such motions have been made and decided. It shows, we think, that pretrial orders do not have a *res judicata* effect.

Moreover, the argument showing that an order on the motion to suppress is not sufficiently final to be

appealable also goes far to demonstrate that the order is not *res judicata*. For "[o]rdinarily the requirement of finality of judgment as a basis for appellate proceedings is the same as that of finality as a basis for the application of the rules of *res judicata*." Restatement of Judgments, Sec. 41, Comment *a*. This Court specifically applied the same standard in determining whether an order was *res judicata* as it would have if the issue had been whether the order was appealable. *United States* v. *Wallace Co., supra*. If there are any differences between the degree of finality required for appeal and the degree required for application of the doctrine of *res judicata*, the greater finality is required in the latter case. Therefore, if the order here is not appealable, it is necessarily not *res judicata*.

ARGUMENT

INTRODUCTION

The issue in this case is the appealability of an order granting respondent's motion to suppress, under Rule 41(e) of the Federal Rules of Criminal Procedure, entered in the Southern District of Florida where the property was seized. Prior to the filing of the motion, a complaint, which was subsequently determined to be invalid, had been filed against petitioner in the Southern District of Ohio. Subsequent to the filing of the motion, but before the order was entered, an indictment was filed in the Southern District of Ohio. The court of appeals below held that, despite the fact that the order was entered in a district other than the district of the indictment, it was not appealable.

In our petition for certiorari in this case, we took the position that the decision of the court of appeals was erroneous. We argued that all orders deciding motions to suppress in districts other than the district of the indictment were appealable. On reconsideration of our position, however, in connection with our presentation in *Di Bella* v. *United States*, No. 21, this Term—which involves the closely related issue of the appealability of orders on motions to suppress filed by the prospective defendant prior to the return of an indictment in that same district—we reached a different conclusion. We now believe that the court of appeals below correctly held that the order of the district court was not appealable.

This does not mean that the writ of certiorari should be dismissed. The interest of the government in these cases is threefold:

1. A clear-cut, easily administerable rule should be established which will at the same time facilitate the expeditious trial of criminal cases consistent with fairness to the defendant. Unnecessary technical or mechanical distinctions should therefore be eschewed. We have concluded, for reasons stated below, that this interest can best be secured by applying here in *Koenig* the same principles as govern *Di Bella* and holding that the order suppressing the evidence is not appealable even though it was entered in a different district than the district in which the trial will take place.

2. Rules of procedure should be uniformly applied. If Di Bella can maintain an appeal, contrary to our submission, then the order is also appealable against

Koenig in the present case; for every distinguishing circumstance argues for giving the order greater finality when, as in the present case, it is made by a court in which the defendant will not be tried. So long as the *Di Bella* case is *sub judice*, the principle of equal treatment prevents disposing of the present case simply by dismissing the writ of certiorari.

3. The finality of an order upon a motion to suppress evidence should be no greater for the purposes of applying the doctrine of *res judicata* than it is for the purposes of appeal. If the order on the motion to suppress is conclusive against the government upon the admissibility of the evidence, and upon a defendant when the order goes against him, fairness to the losing party requires a right of appeal. If the order is *res judicata*, the proceeding cannot be part of the criminal case and the rule against criminal appeals by the government would not apply.

Because of the link between appealability and *res judicata* we would adhere to the position taken in the petition for certiorari and urge that the order suppressing the evidence was appealable if we thought that the order was *res judicata* under Rule 41(e). Indeed, we submit even now that, if the Court concludes that the order has that effect, the appeal should be allowed and the judgment below should be reversed. Upon reexamination, however, we are satisfied for reasons stated at pp. 31–38 that orders granting or denying motions to suppress do not conclusively fix the rights of the parties even when made in a court other than the court in which the criminal case will be tried. In our view, such

an order may be entitled to weight upon principles of comity but it is not *res judicata*.

Accordingly, we submit in Point I of this brief that under the principles suggested in *Di Bella* the order of the district court would not be appealable in this case if the motion to suppress and resulting order had been made in the district in which the indictment was returned and the trial would be held. In Point II we show that the standard of finality should be the same when, as here, the motion is made in another district; for the purpose and effect of a motion to suppress are the same regardless of the court in which the motion is made. The acceptance of this argument would call for rejecting the dicta in two earlier decisions asserting that an order upon a motion to suppress is appealable when made outside the district of trial but, as we will show, those dicta are neither supported by the precedents cited nor in keeping with the analysis of the problem elsewhere in the opinions of the Court. Finally, in Point III we develop more fully our reasons for concluding that the order does not render the admissibility of the evidence *res judicata*.

I

THE ORDER OF THE DISTRICT COURT WOULD NOT HAVE BEEN APPEALABLE IF IT HAD BEEN ENTERED IN THE DISTRICT OF INDICTMENT AND TRIAL

In this case, the motion and order of suppression were not made in the district of the indictment. Nevertheless, we submit that the initial question is whether a similar order based on a similar motion

in the district of indictment would have been appealable. If it would have been, *a fortiori* the government was entitled to appeal the order in this case. For the fact that the motion and order are made in a different district from the district of indictment and trial adds, if anything, an additional degree of finality and separateness from the criminal case. If, on the other hand, a similar order in the district of the criminal case would not be appealable, the basic issue here is whether the standard of appealability should be the same for orders in the district of seizure and the district of indictment. We will contend below (pp. 19–25) that the same standard should be applied because the orders have an equivalent effect.

In our brief in *Di Bella* v. *United States,* No. 21, pp. 21–52, we contend that an order granting or denying a motion under Rule 41(e) is not final and appealable merely because the motion was made before the indictment was returned. In our view the appealability of an order deciding a motion to suppress made before indictment depends upon whether, considering the circumstances, it is simply a procedural phase of the criminal case. In *Di Bella,* the petitioner asked only for the suppression of evidence, not for the return of property. Since the only purpose of the motion was to prevent the introduction of evidence in the criminal case, the order denying the motion was not final and therefore not appealable. On the other hand, when the defendant asks for the return of the seized items and he has an unchallenged and substantial property interest in those items, an

order deciding a motion made before indictment is not just a procedural step in the criminal case. Instead, it involves the independent right to valuable property, and the order determining this right is appealable.

Of course, a defendant has no property interest in contraband or stolen property since he is not entitled to its return even if it was illegally seized. Therefore, an order on a motion seeking return of contraband or stolen property is the equivalent of an order on a motion which seeks merely to suppress evidence, and is not appealable. Similarly, we suggest that where the issue whether the materials are or are not contraband—or stolen—depends on the outcome of the criminal case, the order should likewise not be appealable, at least if it is decided after the indictment is returned. The defendant is not entitled to the return of the property until his right to the property has been litigated in the criminal case—which presumably will be reasonably soon after the indictment has been returned. In these circumstances, the plea for return of the property does not make the motion independent of the criminal case.

Here, a large amount of property was seized: an attaché case (containing 13,190 dollars, a pistol, shoulder holster, and box of ammunition), a masquerade makeup kit, a straw hat, three pairs of slacks, a box (containing forty coin wrappers and miscellaneous notes and receipts), a sport shirt, a calendar sheet for August 1959, 543 one-dollar bills, a ceramic cat (containing 340 dollars), and two rolls

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of pennies.[1] Since respondent asked for the return of this property, the order on his motion would have been appealable *if* he had had an unchallenged right to its return on a finding that the property had been illegally seized. The respondent, however, did not have an unchallenged right to the bulk of this property. The government contends and intends to prove at the criminal trial that the money seized from respondent is part of over 30,000 dollars stolen by respondent from a federally-insured bank and is therefore not his property at all. Even assuming that the money was illegally seized by the government, respondent was not entitled to its return before trial, and accordingly the district court did not order its return. Under the principles suggested by the government in *Di Bella*, the motion, insofar as it related to the money seized, was an integral part of the criminal case. This is especially clear here, since the order was not made until after the criminal case had been begun by the return of the indictment in Ohio.

We do not think that respondent had a substantial enough interest in the other property seized (besides the money) to make the motion seeking return of the property, as well as its suppression as evidence, an independent proceeding—particularly in view of the fact that the order of the district court was entered after the indictment was returned. If his motion had been denied, respondent would have had the oppor-

[1] In addition, the FBI agents seized two pairs of sunglasses and a coin wrapper, but the government did not appeal the suppression of these items.

tunity to obtain appellate review of the denial of the return of his property, after he was tried and convicted, on appeal. If he was not convicted or the government never put him to trial, the property could then be returned. The result of not allowing an immediate appeal (in these circumstances) from the order denying return would be only to deprive petitioner of the use of his property for a period of time. Where the defendant's property interest is so insubstantial—as we believe is the case with the property, other than the money, involved here—we do not think that his plea for immediate return of the property makes the order the culmination of an independent proceeding justifying appeal.[3]

If the defendant could not appeal from the denial of his motion to suppress, we believe that the government is likewise barred from appealing the grant of a motion. It seems clear that the government and the defendant should have the same right of appeal under a general statute authorizing "appeals from all final decisions" of the district courts. 28 U.S.C. 1291, *supra*, p. 2. If an order denying a motion to suppress is not final, then an order granting a motion is likewise not final. The issue is whether the motion and the proceeding to decide it are part of the criminal case—*i.e.*, whether the

[3] In our brief in *Di Bella*, pp. 32, 51, we suggest that $20,100 is a substantial property interest, while documents or copies of documents not needed by the defendant are not. The items here (if the money is excluded) obviously fall somewhere in between these two examples, and in our view lie very close to the documents or copies.

motion concerns the defendant's right to obtain return of valuable property, as well as the use of evidence at the criminal trial, or the latter question alone. Whether the motion is granted or denied, the court has either determined an independent proceeding or it has not. This mutuality, regardless of how the motion is decided, has been assumed by the courts. See *Carroll* v. *United States*, 354 U.S. 394, 405.[4]

In short, consistent with the contentions made in *Di Bella*, we believe that the government would not have been entitled to appeal if the defendant's motion had been made in the district of the indictment. But if we are wrong in *Di Bella* and orders deciding motions for return of this kind of property filed before indictment in the district of the indictment are appealable, *a fortiori* the order in this case is appealable. For here, as in *Di Bella*, the motion was brought after complaint but before indictment and was decided after indictment. In addition, the motion and order were, if anything, more independent of the prospective criminal case since they were in a district other than that where the trial would take place. As we indicate above, we know of no reason why the government should not be entitled to appeal the granting of a motion to suppress where the defendant could have appealed had the motion been denied.[5]

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[4] Of course, Congress may specifically provide for appeal by the government or by the defendant. It has allowed the government to appeal from orders granting motions to suppress in narcotics cases without allowing defendants to appeal from the denial of such motions. 18 U.S.C. 1404.

[5] The only exception, we believe, is if the effect of orders granting and denying motions to suppress is different, *i.e.*, one is *res judicata* as to the introduction of evidence at the criminal trial but the other is not (see *infra*, p. 35).

Accordingly, we turn next to the question whether the present case is distinguishable from *Di Bella* because the motion to suppress was not made in the district where the criminal case would be tried.

II

THE SAME STANDARD OF APPEALABILITY SHOULD BE APPLIED TO ORDERS ENTERED IN THE DISTRICT OF SEIZURE AND THE DISTRICT OF INDICTMENT AND TRIAL

A. THE "ESSENTIAL CHARACTER AND THE CIRCUMSTANCES" OF MOTIONS UNDER RULE 41(e) ARE THE SAME WHETHER THEY ARE BROUGHT IN THE DISTRICT OF INDICTMENT OR ANOTHER DISTRICT, AND THE SAME STANDARD OF APPEALABILITY SHOULD BE APPLIED

Although there are earlier dicta adopting purely mechanical rules as to appealability, such as whether the motion was brought before or after indictment and whether it was brought in the district of trial or another district,* the recent decisions of this Court indicate that the decisive considerations are the substantive purposes and effects of the proceeding, without regard to merely formal distinctions. Thus, in *United States* v. *Wallace Co.*, 336 U.S. 793, 802, the Court stated that "[w]hether a motion is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances."

The basic philosophy of *Carroll* v. *United States*, 354 U.S. 394, is also inconsistent with any arbitrary

* The earlier opinions are discussed at pp. 25–30 below.

theory of appealability. That opinion emphasized strongly that fragmentary appeals are not favored. In addition, quoting from *Cogen* v. *United States, supra,* 278 U.S. at 225, the Court stated that the "'essential character and the circumstances under which it is made' determine whether a motion is an independent proceeding or merely a step in the criminal case" (354 U.S. at 404, note 17). Under this approach there is no room for distinguishing between motions made in the district where the trial will be held and motions made in another district where the evidence was seized. In both cases the essential character of the motion and the circumstances are the same.

If, as in *Di Bella,* a motion is filed prior to indictment seeking only the suppression of evidence, the only purpose, obviously, is to influence the outcome of a criminal prosecution or, possibly, a civil case. The order can have no other effect. This will be true wherever the motion is filed; it should make no difference, therefore, whether an indictment is subsequently returned in the district where the property was seized and the motion was made or in another district.

The same reasoning applies to motions prior to indictment seeking the return of property, as well as the suppression of evidence, where the property is clearly contraband or stolen, or where the issue of whether the property is contraband or stolen depends on the outcome of the criminal case. In either instance, the movant is not entitled to return of the property even if his claim under the Fourth Amendment is correct.

The real purpose of such a motion, either in the district of seizure or in the district of the indictment, is to prevent the use of the evidence at the trial. The district court's order, wherever it be made, decides merely whether the evidence can be used by the government either at the trial or to secure other evidence to be used at the trial.

There is equally little occasion for distinguishing according to the place of the motion in the converse situation. If the prospective defendant moves before indictment for the return of items in which he has a substantial property right, as well as for their suppression as evidence, he has an important interest in their immediate return if his claims under the Fourth Amendment are correct. Thus, as we explain in *Di Bella,* pp. 50–51, orders deciding such motions are appealable if the motions are made before indictment. Such a motion is independent of the prospective criminal case whether it is made in the district of trial or of seizure. In both situations, the district court's order adjudicates an important property right of the movants which is separate and apart from the criminal trial.

The principle is the same when the motion is filed after an indictment has been returned. The motion, under the holdings in *Cogen* and *Carroll,* is part of the proceeding in the criminal case and therefore an order deciding such a motion is not appealable. The reason is substantive, not formal: the relative importance of the criminal or return-of-property aspects of the motion are partly functions of the certainty and proximity of a criminal prosecution, so that once the in-

dictment has been returned the criminal aspects of the motion gain overriding importance. Under these circumstances it can hardly make any difference that the defendant chooses to file his motion in the district of seizure when the criminal case is already pending in another district.

There is no practical or legal bar to treating motions made in one district as part of a criminal case in another. The district courts, including those in different circuits, are all part of a single federal judicial system. The same basic substantive and procedural law applies in all districts. Rule 41(e) speaks of a "motion" to suppress in the district of seizure, which suggests that the proceeding is not automatically separate from the criminal case. In providing for motions to suppress in the district of seizure or of indictment, Rule 41(e) seems to be merely providing two forums for the same motion; it does not even suggest that the motion is legally different depending on which forum the movant happens to choose.

The integral relationship between motions in the district of seizure and the district of indictment is shown by the fact that district courts frequently transfer motions under Rule 41(e) from the district of seizure to the district of indictment. In this very case, a motion to suppress filed by a codefendant in the Eastern District of Texas, which was the district of seizure, was transferred to the Southern District of Ohio. And in *United States* v. *Lester*, 21 F.R.D. 39 (S.D. N.Y.), the district court held that a defendant did not have an absolute right to bring a motion to suppress evidence in the district of seizure. The court de-

clined to determine the motion, but allowed the defendant to move in the district of trial, which was in another circuit. The court reasoned that the issue was highly complicated, that it was interrelated with issues involved in the trial, and that since other property was seized in other districts, if the districts of seizure considered motions to suppress, it would result in duplicate hearings and, perhaps, in conflicting judgments. See also *United States* v. *Klapholz*, 230 F. 2d 494, 497 (C.A. 2), certiorari denied, 351 U.S. 924. The courts, when they transfer motions to suppress from the district of seizure to the district of indictment, do not purport to be deciding the rights of either the defendant or the government. Indeed, it is doubtful whether a transfer would be permissible, even though otherwise proper, if it resulted in the denial of a right as important as immediate appeal. Yet, it would be strange to allow immediate appeal of pretrial orders based on motions transferred to the district of indictment merely because they could have been appealed if decided in the district of seizure, when orders in the district of indictment, based on identical facts and identical motions, could not be appealed.

The close relationship between motions under Rule 41(e) in the district of seizure and of indictment is also shown by the fact that all, or certainly almost all, pre-indictment motions under Rule 41(e) are filed in the district of seizure. If they are filed in any other district, they are subject to dismissal for want of jurisdiction since Rule 41(e) provides only for motions in the district of seizure or of trial. But the

district of trial cannot be ascertained until the indictment is filed. When an indictment is returned in the district of seizure, it automatically becomes the district of indictment and trial. It is only then that the situation in *Di Bella* arises—*i.e.*, a motion filed before indictment in the district which becomes the district of the indictment. It would be incongruous to apply the principles of appealability we suggest in *Di Bella* to a motion in the district of seizure when this district subsequently became the district of the indictment and trial, while applying entirely different principles when the indictment is returned in another district. The character of the proceeding to suppress cannot sensibly be made to depend upon the subsequent and often adventitious selection of the district in which an indictment should be obtained.

The only factor which differentiates motions filed in the district of seizure from those filed in the district of trial is the number assigned to the motion. A motion in the district of seizure receives, of course, a number in that district, and it is therefore different from the number already assigned (if a complaint has been filed) or which will be assigned in the district of the indictment. Here, the motion to suppress was given the number "No. 1667–M Misc." by the Florida district court while the case was labelled "Crim. No. 7558" in the Southern District of Ohio. But this difference is obviously a purely formal distinction. It should have no importance in determining whether the order entered in Florida was appealable, since, regardless of numbers, the motion was an integral part of the criminal case. The difference in numbers is the incidental result of Rule 41(e), by which Con-

gress has allowed interlocutory proceedings to be brought in different parts of the federal judicial system.

B. THE CONTRARY EXPRESSIONS IN THE *COGEN AND CARROLL* DECISIONS ARE NOT CONCLUSIVE

Although we see no basis in principle for determining the appealability of an order granting or denying a motion to suppress according to whether the indictment was returned in the same district, the latter view is supported by statements in two opinions of this Court. In *Cogen* v. *United States*, 278 U.S. 221, the Court said that, where a motion to suppress is filed (*id.* at 225),

> its essential character and the circumstances under which it is made will determine whether it is an independent proceeding or merely a step in the trial of the criminal case. The independent character of the summary proceedings is clear, even where the motion is filed in a criminal case, * * * wherever the motion is filed before there is any indictment or information against the movant, * * * or wherever the criminal proceeding contemplated or pending is in another court, like the motion in *Dier* v. *Banton*, 262 U.S. 147 * * *.

In *Carroll* v. *United States*, 354 U.S. 394, the Court said (*id.* at 403–404):

> Earlier cases illustrated, sometimes without discussion, that under certain conditions orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made *prior to indictment, or* in a *different district* from that in which the trial will occur * * * [citing *Dier* v. *Banton*]. In such

> cases, as appropriate, the Government as well as the moving person has been permitted to appeal from an adverse decision. [Emphasis in the original.]

In *Cogen* and *Carroll*, the issues actually before the Court were whether a defendant and the government respectively could appeal from orders deciding motions to suppress when the motions were made *after* indictment.[1]

In our brief in *Di Bella* v. *United States*—which involves the appealability of orders on motions brought before indictment in the district of trial—we have carefully analyzed the *Cogen* and *Carroll* cases and shown why, in our view, portions of the opinions purporting to summarize existing law should not now be followed. In *Cogen* and *Carroll*, as we have noted, the issues actually before the Court were whether a defendant and the government respectively could appeal from orders deciding motions to suppress when the motions were made *after* indictment. We submit that the above single-line descriptions of the law on issues which were not directly before this Court are not conclusive here, just as they should not be considered conclusive in *Di Bella*.

The same reasons which we have spelled out in *Di Bella* for not following the comparable brief state-

[1] Two courts of appeals have held that orders on motions made in the district of seizure are appealable. *United States* v. *Sineiro*, 190 F. 2d 397 (C.A. 3); *United States* v. *Klapholz*, 230 F. 2d 494 (C.A. 2), certiorari denied, 351 U.S. 924 (by implication). The former relied principally on the statement in *Cogen*, the latter on *Dier* v. *Banton*. Thus, their authority depends largely, as do the *Carroll* and *Cogen* statements, on the *Dier* case.

ments of the law of appealability in *Cogen* and *Carroll* exist in the present case. First, the principle disfavoring fragmentary and nonterminal appeals applies equally in both situations. This principle means that an order which is related to a civil or criminal case should not be appealable unless its independent nature and immediate importance are clear. As we have shown above (pp. 19–25), an order on a motion to suppress in the district of seizure is as closely related to the criminal case as if it had happened to be brought in the district of the indictment.

Second, the time for trying criminal cases will be extended if all orders made in districts other than the district of indictment are appealable. A defendant would be able to delay his trial simply by bringing a motion to suppress in the district of seizure, even after an indictment was returned in another district; the delay would last not only until the appeal was decided but pending action upon a petition for certiorari. Furthermore, to hold that if the motion in the district of seizure is denied, the defendant can appeal even though he could not have appealed if the motion had been filed in the district of the indictment would encourage defendants to bring motions in the district of seizure in order to obtain delay even though it was otherwise more convenient to move in the district of the indictment.

It is surely preferable, except where it would seriously inconvenience the prospective defendant, to hear motions under Rule 41(e) in the district where the criminal trial will occur so that all aspects of the same criminal case can be decided by the same

court. Rule 41(e) does not manifest any other purpose. The aim of the rule in allowing motions in the district of seizure seems to be to provide prospective defendants with an opportunity to secure the immediate return of property which may be of considerable importance to them—not to provide a truly alternative forum for an effort to suppress illegally obtained evidence. Unless there was a provision for filing a motion to return in the district of seizure, the prospective defendant would have no place to bring such a motion if the government delayed obtaining an indictment or did not obtain one at all, since in that instance there would be no district of trial. This construction is supported by the language of Rule 41(e) which seems to allow only motions seeking both return of the property and suppression, not just suppression alone, in the district of seizure; in contrast, it indicates that motions seeking only suppression of evidence must be brought in the district of trial. On the other hand, since Rule 41(e) does not limit the time within which a motion can be brought in the district of seizure to the period before an indictment has been returned, another purpose of the rule may be to provide defendants with an alternative forum for obtaining return of their property which may be significantly more convenient than the district of the indictment. In any event, there is no reason why motions should be encouraged in the district of seizure which in no way are based on the need or convenience of the defendant but which merely furnish opportunity for delay.

Third, *Cogen* and *Carroll* relied on three holdings of this Court for their statements that orders deciding

motions brought before indictment are appealable. In our brief in *Di Bella*, pp. 28–37, we show that these cases do not support that broad dictum. As to the issue involved here—whether all orders in districts other than the district of indictment are appealable—the statements in *Cogen* and *Carroll* rest entirely on this Court's decision in *Dier* v. *Banton*, 262 U.S. 147. There, an involuntary bankrupt had, in compliance with orders of a federal district court, turned his property, assets, account books, and records over to a court-appointed receiver. A state district attorney applied to the receiver for production of the books and papers before a state grand jury. The bankrupt applied for an injunction against both the district attorney and the receiver to prevent the records from being used against him before the grand jury, on the ground that such use would violate his Fourth and Fifth Amendment rights. The district court refused the injunction, and appeal was taken to this Court, which decided the matter upon the merits without discussing appealability.

The holding in *Dier* v. *Banton* as to appealability is merely implicit and it apparently did not receive consideration by the Court. In any event, we think that in *Dier* v. *Banton* the order was properly appealable. That case, unlike the present one, involved two separate sovereignties, not merely two different courts within the same judicial system. We have argued above (pp. 19–25) that a motion brought under Rule 41(e) in the district of seizure is in reality a part of the criminal trial and that the fortuitous fact that two different districts are involved makes no practical or

legal difference. On the other hand it is obvious that a motion to suppress in a federal court cannot be part of the criminal case in a state court. While a difference in courts should not make an order appealable, a difference in sovereignties should.

Fourth, even if *Dier* v. *Banton* were in point as to the issue involved in this case, we do not think that it should still be considered binding. It was decided in 1923, at approximately the same time as this Court decided the cases relied on in *Cogen* and *Carroll* for the proposition that all orders deciding motions brought before indictment are appealable. In our brief in *Di Bella*, pp. 37–40, we show that these cases, which arose when motions to suppress were first becoming common, should not now be considered binding. The courts were then generous in allowing appeals in order to settle the new procedures on motions to suppress and because of doubt whether the orders would be *res judicata*. Moreover, the absence of discussion of appealability in most of these earlier cases indicates that both the litigants and the courts were not fully aware of the problem.

Finally, again as we point out in our brief in *Di Bella*, pp. 40–43, 47 and at pp. 19–20 above, recent decisions of this Court strongly indicate that questions of appealability are no longer to be determined by purely mechanical rules as to appealability.

In sum, we conclude that, when judged by considerations apart from its effect under the doctrine of *res judicata*, the order of the district court should be held not to be appealable even though it was not made by the court in which defendant will be tried. But as

we discuss below (pp. 36–38), those considerations do not stand alone. If the order renders the admissibility of the evidence *res judicata*, the party adversely affected would have a right to appeal under the principle that orders are appealable which finally adjudicate an important right of a party to the litigation. *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541; *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684. Accordingly, we turn now to the latter question.

III

THE ORDER OF THE DISTRICT COURT WAS NOT APPEALABLE ON THE GROUND THAT IT RENDERED THE ADMISSIBILITY OF THE EVIDENCE *RES JUDICATA* AT PETITIONER'S TRIAL

This Court has not yet finally determined the precise extent to which the judge who presides at a criminal trial is bound by a pretrial order on the admissibility of challenged evidence entered in the same district court. In *Gouled* v. *United States*, 255 U.S. 298, 312–313, the Court held that "where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial." While the motion to suppress had been filed subsequent to indictment—and therefore under this Court's subsequent decision in the *Cogen* case was not final—in *Gouled* the Court did not rely on this fact. Although the language in the *Gouled* opinion leaves undetermined the exact extent to which

the trial court must give weight to the pretrial order, it is clear that the pretrial order is not *res judicata*.[8]

The situation is much the same in the district courts and circuit courts of appeals: while it is not firmly established whether a trial court can, in the absence of new evidence or exceptional circumstances, refuse to follow a pretrial order in the district of the indictment, none of the decisions suggests that the admissibility of the evidence becomes *res judicata*. The prevailing view seems to be that the trial judge has a large measure of discretion, since he is the governor of the trial with control over the admission of evidence. *Gatewood* v. *United States*, 209 F. 2d 789, 793 (C.A. D.C.) (dictum that a pretrial order under Rule 41(e) is not binding); *Waldron* v. *United States*, 219 F. 2d 37, 41 (C.A. D.C.) (trial court, in its discretion, can reconsider an order under Rule 41(e)); cf. *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F. 2d 131, 134–136 (C.A. 2) (reconsideration of a motion for summary judgment is at the discretion of the trial judge); see also *United States* v. *Jackson*, 149 F. Supp. 937, 938 (D. D.C.), reversed on other grounds, 250 F. 2d 772 (C.A. D.C.) (not clear if the trial court can reconsider an order under Rule 41(e) only on the basis of new evidence or even without it). But

[8] This Court has clearly indicated in other decisions that an interlocutory order on a pretrial motion is not *res judicata*. *Carroll* v. *United States*, *supra*, 354 U.S. at 404; *Cogen* v. *United States*, *supra*, 278 U.S. at 224; see also *United States* v. *Cefaratti*, 202 F. 2d 13 (C.A. D.C.), certiorari denied, 345 U.S. 907 (overruled on other grounds in the *Carroll* case). These decisions do not establish independently that all pretrial orders are not *res judicata*: rather, the decisions turn on the lack of finality of the particular order.

see *United States* v. *Wheeler*, 256 F. 2d 745 (C.A. 3), certiorari denied, 358 U.S. 873 (no reconsideration on rehearing of an order under Rule 41(e) in the absence of new evidence; the court did not decide if the trial court could reconsider the order without new evidence);[9] cf. *TCF Film Corp.* v. *Gourley*, 240 F. 2d 711 (C.A. 3) (no reconsideration of an order denying a motion to file an amended complaint except in exceptional circumstances)."[10] Those courts indicating that the trial court is bound unless there is new evidence or exceptional circumstances have based this requirement on the ground of comity, not *res judicata*: *e.g.*, "judges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other" (*TCF Films* v. *Gourley, supra*, 240 F. 2d at 713). The fact that it appears to be well established that the trial court can reexamine a pretrial order on a motion to suppress if there is new evidence or exceptional cir-

[9] *Wheeler* forbade *pretrial* reconsideration of the order so as "to prevent shopping about by the defeated party for a judge more favorably disposed to whom a petition for reconsideration may be presented." 256 F. 2d at 748. The element of "judge shopping" is not presented, however, when the issue is raised *at the trial itself*. In such a situation, the trial judge "must conscientiously carry out his judicial function in a case over which he is presiding. He is not doing this if he permits what he believes to be a prior erroneous ruling to control the case." *Castner* v. *First National Bank of Anchorage*, 278 F. 2d 376, 380 (C.A. 9).

[10] Only one case, as far as we can ascertain, holds that a trial court is absolutely forbidden to reconsider a pretrial order under Rule 41(e). *United States* v. *Jennings*, 19 F.R.D. 311 (D. D.C.). The court of appeals affirmed, however, only after noting that no new evidence had been adduced on the issue at the trial and that the trial court had reconsidered the evidence on the point after the trial. 247 F. 2d 784, 785.

cumstances demonstrates that the pretrial order is not absolutely binding, *i.e.*, it is not *res judicata*. This means, at the least, that orders on motions to suppress in the same district are not *res judicata* if they are not appealable. Indeed, since the decisions do not rest on whether the order was final and appealable, it appears that even final orders which could be appealed are not absolutely binding on the trial court.[11]

The rule should be the same with respect to orders entered in the district of seizure instead of the district of trial. As we have shown in discussing the appealability of such orders (pp. 19–25), a motion under Rule 41(e) in the district of seizure bears essentially the same relationship to the criminal trial as such a motion in the district of trial. Under that principle, the law as to a pretrial motion in the district of the trial is directly applicable to the question whether an order in the district of seizure is *res judicata*.

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[11] The only exception is a practical one: If the court before trial grants the motion and orders return of the property to the defendant, the practical effect may be to bind the government at the trial. The government would not have the evidence to introduce, unless conceivably it subsequently recovered the property through a subpoena or search warrant. Cf. *United States* v. *Wallace Co.*, *supra*, 336 U.S. at 801. This situation can only arise, however, with regard to motions brought after indictment. Orders on pre-indictment motions seeking return of property to which the defendant has a substantial and unchallenged interest are, in our view (see *supra*, pp. 14–15), appealable by either the government or the defendant. If the trial court grants a pre-indictment motion seeking return of materials in which the defendant has an insubstantial property interest, it seems proper judicial administration for a district court merely to order suppression. In that way, it is possible for the trial court, on the basis of new evidence or any other proper reason, to reconsider the order; the defendant is not substantially injured since he has no important interest in immediate return of the property.

The only basis for a distinction between motions under Rule 41(e) brought in the district of seizure and those brought in the district of trial is a very literal reading of Rule 41(e) itself. Referring to a motion brought in the district of seizure, the Rule states that "[i]f the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial." We do not believe, however, that this provision puts orders in the district of seizure beyond any possible reconsideration by the trial court. If it did, it would make *res judicata* only orders granting motions against the government, while orders denying motions would not bind the defendant. This would be an anomalous result since logically an order is neither more nor less final depending on whether it decides in favor of one party or the other (see *supra*, pp. 17–18). It is the general rule that *res judicata* applies equally to both parties to a litigation. If orders granting motions under Rule 41(e) were *res judicata*, this would mean that such orders were final and therefore appealable by the government (see *infra*, pp. 36–38), while prospective defendants would not be able to appeal when their motions were denied in identical circumstances.

Our reading of Rule 41(e) is confirmed by a subsequent provision in the Rule which, apparently referring to motions both in the district of seizure and of trial, says: "The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds of the motion, but the [trial] court in its discretion may entertain the motion at the trial or hearing." While

this could conceivably have been interpreted as allowing motions at the trial only if they had not been made and decided before trial, we have seen (pp. 31–33) that the courts have allowed reconsideration of pretrial motions at the trial.

The precise question whether an order on a motion to suppress in another district is absolutely binding on the trial court has been directly considered in only one case. In *United States* v. *Brewer*, 24 F.R.D. 129 (N.D. Ga.), the court held that the prior ruling must be followed by the trial court, but only "[i]n the absence of exceptional circumstances." Since the court cited the *Wheeler* case, as well as the *TCF Films* case, for this proposition, it seems clear that, by exceptional circumstances, it included new evidence (see *supra*, pp. 32–33). Thus, as we have indicated above, the court was in effect holding that the order of the district of seizure did not have a *res judicata* effect. Moreover, this decision, if it had held that orders in the district of seizure are *res judicata*, would have been overruled by the decision of the court of appeals below stating that the rule in the Fifth Circuit was to the contrary (R. 25–26).[11]

The arguments showing that an order on the motion to suppress is not sufficiently final to be appealable even when the district of seizure differs from the district of trial also go far to demonstrate that the order is not *res judicata*. Both questions turn upon the finality of the order. "Ordinarily the requirement

[11] We add that, in our view, the *Brewer* court was far too parsimonious in its statement of the circumstances under which the trial court could properly reconsider the earlier suppression order.

of finality of judgment as a basis for appellate proceedings is the same as that of finality as a basis for the application of the rules of *res judicata.*" Restatement of Judgments, Sec. 41, Comment *a.* See also *Merriam Co.* v. *Saalfield*, 241 U.S. 22, 28; *Smith* v. *McCool*, 16 Wall. 560, 561. This question was considered by this Court in *United States* v. *Wallace Co.*, *supra*, 336 U.S. 793. The district court, after indictment, ordered the suppression of certain documents as illegally seized, and their return to the defendants. Subsequently, the government brought a civil action and sought to subpoena the documents. In answer to the defendants' contention that the suppression order was *res judicata*, this Court applied the same standards in determining whether the order was *res judicata* as it would have if the issue had been whether the order was appealable (*id.* at 802):

> To some extent both phases of the contention—scope of the order and its appealability—depend upon whether the proceeding was handled by the court as an independent plenary proceeding or one to suppress evidence at a forthcoming trial. For a judgment in an independent plenary proceeding for return of property and its suppression as evidence is final and appealable and the scope of relief in such a case may extend far beyond its effect on a pending trial; but a decision on a motion to return or suppress evidence in a pending trial may be no more than a procedural step in a particular case and in such event the effect of the decision would not extend beyond that case. Whether a motion is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances.

The Court concluded that the proceedings under Rule 41(e) were a part of the criminal proceedings and that therefore the "order does not stand as a bar to consideration of the availability of the documents for use as evidence in this civil case." *Id.* at 803. Similarly, in *Cogen* v. *United States, supra,* 278 U.S. at 224, and *Carroll* v. *United States, supra,* 354 U.S. at 404, the Court indicated that a nonappealable order on a motion to suppress evidence is not *res judicata.*

If there are differences between the degree of finality required for appeal and the degree required for application of the doctrine of *res judicata,* the greater finality is required in the latter case. It follows that an order may be appealable without being *res judicata,* but the converse proposition is not true. As we point out above, therefore (pp. 30–31), if the Court is of the opinion that the order of suppression would be *res judicata* in the present case, it should hold that the order was sufficiently final and separate from the criminal case to support an appeal.

In sum, we believe that the order below is not *res judicata* for two separate reasons: The order was not final; and, even if it had been final for purposes of appealability, it would not have been absolutely binding on the trial court. But, we again emphasize, if we are wrong in this contention and the order below is held to be *res judicata,* by the same token the order was necessarily final and not an integral part of the criminal case, and accordingly was appealable.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the court of appeals should be affirmed. If, however, this Court holds in *Di Bella,* No. 21, that the order there was appealable, or if the Court decides that the order of the district court below renders the legality of the seizure *res judicata,* it is respectfully submitted that the judgment below should be reversed and the appeal to the court of appeals from the order of the district court should be reinstated.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 93

UNITED STATES OF AMERICA,

Petitioner,

vs.

DANIEL J. KOENIG.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE RESPONDENT

JOS. P. MANNERS
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and

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CITATIONS

CASES:

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DANIEL J. KOENIG.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE RESPONDENT

Question Presented

The question as phrased by the petitioner is acceptable.

Statutes Involved

18 U.S.C. 3731 states, in part:

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count

thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted."

28 U.S.C. 1291 provides:

Final decisions of district courts.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended October 31, 1951, c. 655 § 48, 67 Stat. 726."

Rule 41 (e), Federal Rules of Criminal Procedure, states:

(e) Motion for Return of Property and to Suppress Evidence.

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the

warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made *in the district where the trial is* to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Statement of the Case

Respondent accepts the petitioner's Statement as set forth in its Brief, but further calls to this Court's attention that on the night of September 29, 1959, ten agents of the F.B.I. searched his residence, curtilage, garage and automobile (Tr. 61)[1] pursuant to instruction by teletype to the F.B.I. Miami office to "'attempt to locate and apprehend Koenig, being alert for ideal search situation incidental to arrest'" (Tr. 279).

ARGUMENT

The issue in this case is the appealability of an order granting the respondent's motion to suppress, under Rule 41 (e) of the Federal Rules of Criminal Procedure, entered in the Southern District of Florida, the district of seizure, affecting the admissibility of evidence, which the petitioner will be attempting to introduce in the criminal trial to be held in the Southern District of Ohio.

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[1] "Tr." refers to the transcript in the court of appeals which has been filed with the Clerk of this Court.

Prior to the filing of the motion, a complaint, which was subsequently determined to be invalid, had been filed against petitioner in the Southern District of Ohio. Subsequent to the filing of the motion, but before the order was entered, an indictment was filed in the Southern District of Ohio. The court of appeals held that, despite the fact that the order was entered in a district other than the district of the indictment, it was not appealable.

The petitioner has now adopted the view that the Fifth Circuit Court of Appeals "was correct that the order of the district court was not properly appealable" (Introduction of Argument, Petitioner's Brief), and is now arguing, as the Respondent has consistently maintained, that (1) this Court has never decided that an order on a motion to suppress evidence entered in a district of seizure, which said district is different from the district in which the trial is to be had, is as such a "final" order in an independent plenary proceeding; and (2) that the dictum in *Cogen* v. *United States*, 278 U.S. 221, and in *Carroll* v. *United States*, 354 U.S. 394, is not conclusive and should not be followed.

In its petitions for certiorari in both this case and in *DiBella* v. *United States*, No. 21 this Term, the petitioner has steadfastly contended—and the respondent has been and is continuing to be in accord—that an order granting or denying a motion to suppress evidence under Rule 41 (e) is not a final order in an independent plenary action and appealable merely because the motion was made prior to the return of the indictment and in particular where the order is entered after the return of the indictment. Also, in accord with this position are the Courts of Appeal for the Fourth Circuit, *United States* v. *Williams*, 227 F.2d 149; the Fifth Circuit, *Zacarias* v. *United States*, 261 F.2d 416, cert. denied, 359 U.S. 935; and the District of

Columbia, *Nelson* v. *United States*, 208 F.2d 505, cert. denied, 346 U.S. 827. A contrary view is supported by the Second Circuit, *Cheng Wai* v. *United States*, 125 F.2d 915; *DiBella* v. *United States*, 284 F.2d 897; and the Third Circuit, *In re Sana Laboratories*, 115 F.2d 717, cert. denied 312 U.S. 688.

Because of the present position of the petitioner in this case, as set forth in Points I and II of its Brief, and the constant position of the petitioner in the *DiBella* case, the respondent adopts the petitioner's arguments in so far as they relate to the above. The respondent does not accept, nor does he adopt, the petitioner's argument under Point III of its Brief.

As to petitioner's Point III, and now the respondent's only argument to be made in this Brief, the respondent will first contend that the finality of an order deciding a motion to suppress does not affect the appealability of the order, and second that the order is binding.

I.

The Final Feature of an Order Deciding a Motion to Suppress Evidence Cannot Affect the Appealability of the Order.

Both the petitioner and respondent agree that the instant motion to suppress evidence is part of the criminal case and not in any fashion an independent action. Finality of an order does not in and by itself change the character of any criminal case, once it is determined that the order is part of the said criminal case. For example, a defendant in a criminal case may attack the indictment or information by a motion to dismiss. An order is entered denying his motion. This order is as final as any example possible in any criminal case. However, the finality of this

order does not give it appealability because it is not entered in an independent action. The motion was filed as part of the criminal case; it was heard as part of the criminal case; it was decided as part of the criminal case; and its only purpose—to affect the outcome of the criminal case. Even if this motion, in the above example, were granted, the Government's right to appeal comes only from the criminal statutes, in particular 18 U.S.C. § 3731, as this is a criminal matter and the appellate rights of the Government are strictly controlled by the Criminal Appeals Act, as amended and found in the Code as above mentioned. The finality of the order in the above example did not change the nature of the criminal action and did not make a motion which was part of a criminal case in the first instance, a motion giving rise to an independent plenary action, and appealable under 28 U.S.C. 1291.

The case of *United States* v. *Williams*, 227 F.2d 149 (C.A. 4, 1955) supports the above. Therein a defendant filed motions about a week after he had waived his hearing before the commissioner, asking the lower court to suppress the evidence, to dismiss the criminal action and to quash whatever indictment might be returned based upon the illegally seized evidence. About two months later an indictment was returned. Some months later the motions were heard and granted, and the court ordered the case dismissed. The Government appealed more than thirty (30) days after the entry of the order. The court, at page 151, held:

> "We think, however, that the appeal must be dismissed. The order was not a final order made in a civil proceeding, from which an appeal would lie and from which the Government would have 60 days in which to take an appeal, but an order in a criminal proceeding. The motion was entitled in the criminal

proceeding and the relief asked was, not return of the contraband liquor or the restraint generally of officers of the law, but the suppression of evidence in the criminal proceeding, the quashing of the indictment therein, and the dismissal of the proceeding. The order was entered in the criminal proceeding and it granted the motion as made and dismissed the proceeding. In so far as it related to the suppression of the evidence, the order was clearly interlocutory and not independently appealable. *Cogen* v. *United States*, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275; *United States* v. *Wallace and Tiernan Co.*, 336 U.S. 793, 69 S.Ct. 824, 93 L.Ed. 1042. In so far as it ordered a dismissal of the indictment in the case, it was not taken within 30 days and must be dismissed for that reason under Rule 37 of the Federal Rules of Criminal Procedure, 18 U.S.C.A."

No court would have permitted the respondent herein to appeal from an order denying his motion to suppress had the respondent filed his motion in the district of trial and subsequent to the return of the indictment, and yet the order denying his motion could only be termed "final". The finality of that order would not give it appealability because of this Court's rule against fragmentary appeals, especially in criminal cases. See *Cobbledick* v. *United States*, 309 U.S. 323, where at page 326 this Court said:

"... An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await

his conviction before its reconsideration by an appellate tribunal."

Thus, the finality of any order denying a defendant's motion in a criminal case, which motion is an integral part or step in a criminal proceeding, does not make it appealable under 28 U.S.C. 1291; and further, the finality of any order granting a defendant's motion in a criminal case, which motion is an integral part or step in a criminal proceeding does not make it any more appealable than whatever final orders may be appealed by the Government under 18 U.S.C. 3731.

It follows that if a motion, by its nature, judged in relation to the case as a whole is part of a criminal case, the finality of any order entered is still part of the same criminal matter and that the "finality" does not change a procedure in a criminal case to an independent and different cause of action.

II.

The Final Order Below Is Binding Upon the Trial Court in This Criminal Case.

The respondent agrees with the petitioner that this order is not *res judicata* as it is not a final judgment in an independent action and it is "familiar law that only a final judgment is *res judicata* as between the parties." *Merriam Co.* v. *Saalfield*, 241 U.S. 22, 28. However, the binding feature of this final order is in dispute. By the injection of the term *res judicata* the petitioner argues that in so far as this order is not *res judicata*, it must logically follow that the order is not binding upon the trial court. In *United States* v. *Wallace and Tiernan Co.*, 336 U.S. 793, relied upon by the petitioner to argue that this order is not *res judicata*, the case does go somewhat further and

does hold that the suppression order in the criminal case was binding as to the evidence in the criminal case. Therein the defendants' books and records were subpoenaed before a grand jury which later returned an indictment against them, and which indictment was later dismissed as the grand jury was illegally constituted. The trial court, after an information was filed, held that the evidence obtained by the Government through use of the above grand jury was not to be used against the defendants in the criminal prosecution. The Government filed a civil proceeding against the defendants and then moved for production of these same books and records. The motion being denied, and the case being dismissed gave rise to the appeal wherein this Court reversed the lower court. This Court's holding was based on the fact that the order in the criminal case did not extend beyond the criminal case as it was a part of the criminal case and limited to the criminal case, and therefore, not a "final judgment" as to be *res judicata* in the civil action. In this regard this Court did state, at page 802:

> ". . . The circumstances here we think show that the order now considered was not one of permanent general 'outlawry' against all use of the documents involved, but an order to prevent their use in a particular criminal proceeding then pending."

In its direct holding, this Court at page 803, stated:

> "We hold that the proceedings leading up to the preclusion order must be deemed a part of the criminal proceedings, see Cogen v. United States, 278 U.S. 221, 227, 73 L.ed. 275, 282, 49 S.Ct. 118; that the order did not preclude use of the documents except in these proceedings: . . ."

the duty of the trial court to entertain proper objections "even where a motion to return the papers may have been denied before trial," this Court in *Gouled* stressed that a "rule of practice must not be allowed for any technical reason to prevail over a constitutional right." It becomes apparent that the reason for the holding was based upon the importance of constitutional rights of any defendant under the Amendments to the United States Constitution.

The respondent has been unable to find any case where a trial court reopened the matter of a reasonableness of a search and seizure after the *grant* of a pretrial motion to suppress. It is interesting to note, however, that those courts holding that the *denial* of a motion to suppress is binding, stress the comity that exists between courts of coordinate jurisdiction and the requirements of efficient trial procedure. See *United States* v. *Wheeler*, 256 F.2d 745 (C.A. 3, 1958), cert. denied, 358 U.S. 873, which takes the strict view in this regard but which also recognizes that a defendant's constitutional safeguards are superior to any theory of comity or efficient trial procedure. See also *United States* v. *Brewer*, 24 F.R.D. 129 (N.D. Ga., 1959). For a less strict view of the above, permitting more discretion in the trial court to reconsider a *denial* of a motion to suppress, see *Waldron* v. *United States*, 219 F.2d 37 (C.A. D.C., 1955) (still stressing, however, at page 41, that once "the court has disposed of a point concerning the admission or exclusion of evidence, litigants must proceed to try the case accordingly."); *Gatewood* v. *United States*, 209 F.2d 789 (C.A. D.C., 1953) (at page 793, "that under Rule 41 (e) a pretrial denial of a motion . . . is not binding on the trial judge"—stressing the unconstitutionality of the search and seizure and the *denial* of the motion objecting to the same.).

Regardless of which view is followed, the courts all agree that the binding quality of a *denial* of a motion to

suppress comes under the theory of comity that exists between courts or judges of coordinate jurisdiction and/or, the requirements of efficient and orderly trial procedures. The above binding feature is only overcome in the above cases by the constitutional rights guaranteed to any individual under the Amendments to the United States Constitution. See *Gouled* v. *United States*, 255 U.S. 298.

It would appear, then, that there is a difference between the binding effect of a *grant* and that of a *denial* of a motion to suppress. This difference being the constitutional rights enjoyed by an individual.

Under what theory then can the petitioner seek to reopen or have the trial court in this case reconsider an individual's motion to suppress? If opportunity it had, this should have been by a petition for re-hearing to the district judge issuing the *grant* of this respondent's motion to suppress shortly after the order was entered. If the petitioner then had proper grounds, based upon fact or law, or both, the district judge presiding in the district of seizure and who had issued the grant, should have been given an opportunity to reconsider his decision as this is the better trial procedure and obviously avoids multiple full hearings. As this order stands now, the petitioner must file something other than the usual pleading for rehearing as some two years—less a week or two—have transpired since the order was entered and this respondent still sits in jail awaiting his trial—which trial has constantly been postponed over objection of this respondent because of the petitioner's requests.

It is the respondent's position that this order *granting* his pretrial motion to suppress, which motion is a part of the criminal case, is final as such to be binding in the instant criminal case.

Conclusion

Because of that portion of the petitioner's argument adopted herein and because of the aforesaid, it is respectfully submitted that the judgment of the Fifth Circuit Court of Appeals be affirmed as to lack of jurisdiction for petitioner to appeal.

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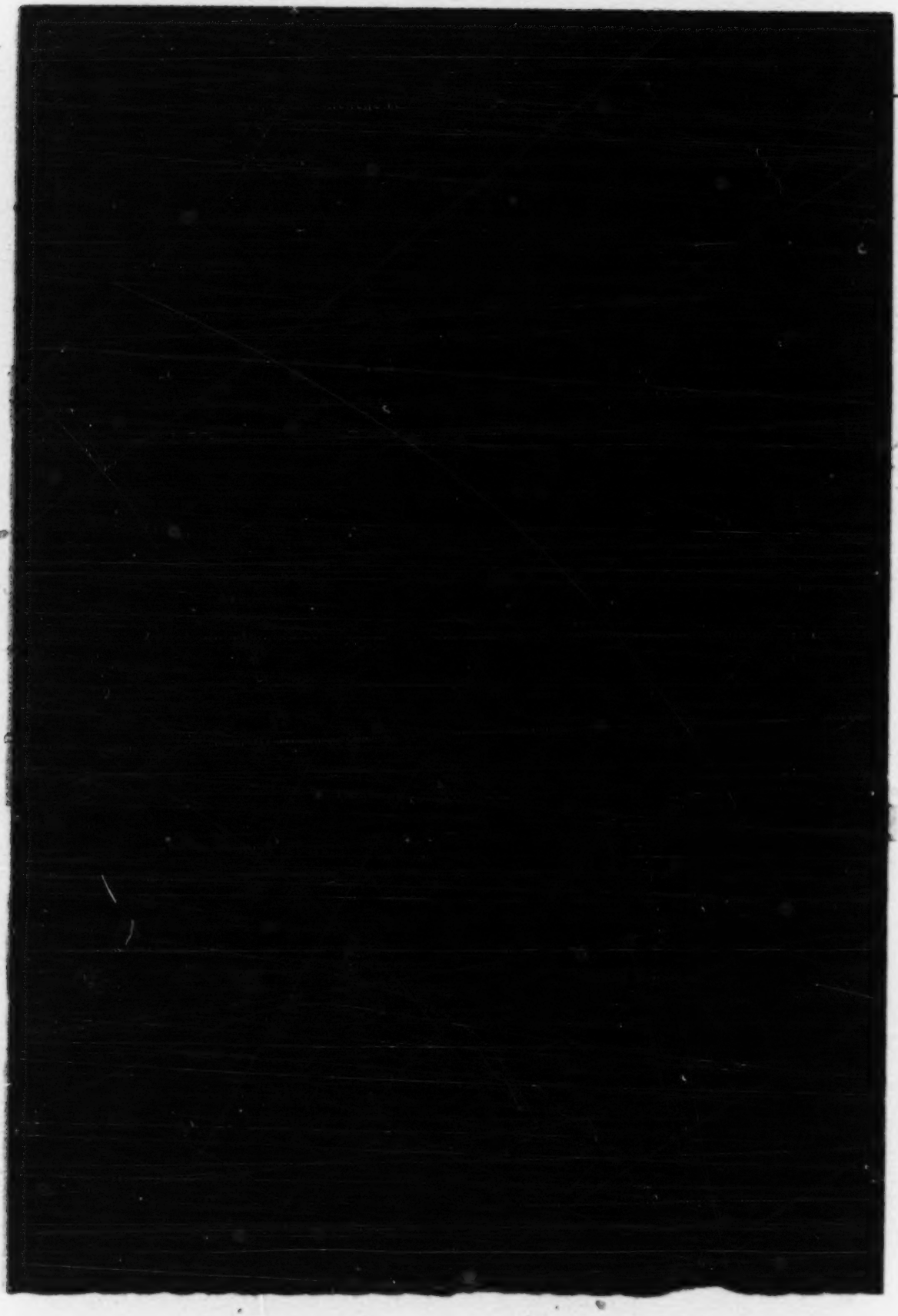

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 93

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL J. KOENIG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In its brief-in-chief, the government contended that the order of the district court in this case granting a motion to suppress, entered in a district other than the district of trial, is a part of the criminal proceeding and was therefore not appealable. We further contended that such an order is not *res judicata* as to the admission of evidence at the criminal trial. Respondent, while agreeing with the government that the order is not appealable and is not *res judicata,* claims that it is nevertheless binding on the trial court. We reemphasize, however, that an order issued in the district of trial may be reconsidered by the trial court, and that if an order issued in the district of seizure is, as we contend, merely a decision on a motion made in the criminal case, then it too must be subject to recon-

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sideration by the trial court. On the other hand, if the trial court were held to be bound by the order issued in the district of seizure, we submit that it would have to be because that order is deemed to be a final decision made in an independent proceeding. Such a final decision would necessarily also be appealable.

1. In addition to the authorities cited in the government's original brief (pp. 31–33), we believe that this Court's decision in *Carroll* v. *United States*, 354 U.S. 394, strongly supports our contention that a non-appealable order on a motion to suppress which is considered part of the criminal case can be reconsidered by the trial court. The defendant in *Carroll* contended that the court of appeals had no jurisdiction to hear an appeal from an order *granting* a post-indictment motion to suppress because, under *Cogen* v. *United States*, 278 U.S. 221, it would have had no jurisdiction to hear an appeal from an order denying the motion. In answer to this argument, the government pointed to the rule relied on by respondent in this case, the provision of Rule 41(e) of the Federal Rules of Criminal Procedure that "[i]f the motion is granted the property * * * shall not be admissible in evidence at any hearing or trial." The government maintained that this language meant that while a defendant could obtain reconsideration of an adverse pre-trial ruling by renewing his motion when the evidence was offered during the trial, the government could not obtain reconsideration of an order granting a motion to suppress. We then stated that the *Cogen* holding

was based on the premise that an order denying the motion could be reconsidered by the trial court (see 278 U.S. at 224). We therefore concluded that the grant of a motion to suppress filed prior to trial was fundamentally different from a denial and hence that different considerations should apply: in short, that a denial is interlocutory "because it does not necessarily settle the question of evidentiary admissibility," while a grant settles the question and hence is independent, plenary, and final. Brief for the United States, No. 571, Oct. Term, 1956, pp. 48–50.

This Court answered the government's argument by saying (354 U.S. 404):

> But a motion made by a defendant after indictment and in the district of trial has none of the aspects of independence just noted, as the Court held in *Cogen* v. *United States*, 278 U.S. 221. As the opinion by Mr. Justice Brandeis explains, the denial of a pre-trial motion in this posture is interlocutory in form *and real effect*, and thus not appealable at the instance of the defendant. *We think the granting of such a motion also has an interlocutory character*, and therefore cannot be the subject of an appeal by the Government. [Emphasis added.]

The explanation by Mr. Justice Brandeis in *Cogen*, to which the Court referred, was as follows (278 U.S. at 224):

> It is not true that the decision on such a motion for the return of papers necessarily settles the question of their admissibility in evidence.

> If the motion is denied, the objection to the admissibility as evidence is usually renewed when the paper is offered at the trial. *And, although the preliminary motion was denied, the objection made at the trial to the admission of the evidence may be sustained.* For as was said in *Gouled* v. *United States*, 255 U.S. 298, 312–313: "* * * where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial."[1] [Emphasis added.]

When the Court said in *Carroll* that the denial of the motion "is interlocutory in * * * real effect" for the reasons given by Mr. Justice Brandeis in *Cogen*, and then added immediately afterward that "[w]e think the granting of such a motion also has an interlocutory character," it held, in effect, that the government had misread Rule 41(e) and erroneously deduced that the grant of a motion cannot be reconsidered. Thus, in *Carroll* this Court applied the *Cogen* standard for determining whether orders *denying* motions to suppress are interlocutory to orders *granting* motions to suppress, and held that the latter are as susceptible to reconsideration by the trial court as are orders denying such motions.

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[1] We discuss the *Gouled* case at pp. 31–32 of our original brief.

2. While respondent admits that the order of suppression is not *res judicata,* he claims that it is nevertheless binding on the trial court. He bases this contention on principles of comity and coordinate jurisdiction. We submit, however, that the same cases and reasons which demonstrate that an order granting a motion to suppress are not binding on *res judicata* grounds likewise show that such an order is not binding on the basis of any other principle. Moreover, since the principles of comity and coordinate jurisdiction apply equally to reconsideration of orders denying motions to suppress and to orders granting such motions, respondent's contention would also mean that the denial of a motion to suppress could not be reconsidered by the trial court. It is well established, however, that the trial court can exclude evidence because it was illegally seized even though a motion to suppress was denied before trial. *E.g., Cogen* v. *United States, supra; Gouled* v. *United States, supra.*

In addition, we submit that respondent has misconstrued the effect of the principles of comity and coordinate jurisdiction; unlike *res judicata,* they do not absolutely prevent reconsideration of the decision by another court. Ordinarily, of course, a district judge will follow the earlier decision of another district judge in the same case. But the doctrines of comity, coordinate jurisdiction, and law of the case do not require that the earlier decision be followed in every situation. At the least, a district court can properly exercise its discretion to reconsider an earlier decision either in the same district or in another

district if important new evidence is offered, the applicable law has changed, the earlier decision was clearly erroneous, or comparable circumstances exist.

The federal courts have uniformly refused to consider earlier decisions in the same criminal case as absolutely binding. For example, in *Messenger* v. *Anderson*, 225 U.S. 436, 444, Mr. Justice Holmes stated that "law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."[2] Similarly, in *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F. 2d 131 (C.A. 2), in an opinion by Judge Learned Hand, the court of appeals held that the trial court had discretion to reconsider an order denying a pre-trial motion for summary judgment. Accord, *Castner* v. *First National Bank of Anchorage*, 268 F. 2d 376 (C.A. 9). Even in the Third Circuit, where the "co-ordinate jurisdiction" rule is most strongly maintained, reconsideration by one judge of an order issued by another judge is permitted in exceptional circumstances such as the unavailability of the judge who made the original decision because of death, resignation, or termination of a temporary assignment (see *TCF Film Corp.* v.

[2] Although Mr. Justice Holmes was considering the effect of an earlier court of appeals decision on a subsequent appeal in the same case there is no substantial difference between that situation and the one where a district judge must determine the effect of an earlier district court decision. *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F. 2d 131, 136 (C.A. 2).

Gourley, 240 F. 2d 711, 714 (C.A. 3),[3] or the presentation of new evidence (see *United States* v. *Wheeler*, 256 F. 2d 745 (C.A. 3), certiorari denied, 358 U.S. 873).

Respectfully submitted.

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JANUARY, 1962.

[3] Under the decision in *Gourley*, it would appear that the order of the district court in this case could be reconsidered by the trial court. The court of appeals held in *Gourley* that an order could be reconsidered by another judge if the temporary assignment of the judge who issued it had terminated and he had left the district. Here, the Florida district court had jurisdiction over the Ohio criminal case only to the extent of hearing and deciding the motion to suppress. Once that decision was made, the Florida court's "assignment" to the case was terminated, and all aspects of the case were returned to Ohio. The Florida court was therefore as "unavailable" for considering an application for rehearing as was the judge in *Gourley* whose assignment had terminated.

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